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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

NO. 72-95

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LEWIS S. TOLLETT, WARDEN,
*Petitioner*,

*v.*

WILLIE LEE HENDERSON,
*Respondent*.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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PETITION FOR CERTIORARI FILED JULY 17, 1972

CERTIORARI GRANTED OCTOBER 16, 1972

In The

# UNITED STATES DISTRICT COURT

For the Middle District of Tennessee

Nashville Division

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**Civil Action No. 5996**

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WILLIE LEE HENDERSON

v.

LEWIS S. TOLLETT, Warden
Brushy Mountain State Prison

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## RELEVANT DOCKET ENTRIES

December 29, 1970 Order Entered: Clerk to file petition of Willie Lee Henderson in forma pauperis; Respondent to Show Cause.

December 29, 1970 Filed: Petition for Writ of Habeas Corpus, with Exhibits.

January 18, 1971 Filed: Respondent's Notice of Filing Documents, with Documents #1 through 7.

January 18, 1971 Filed: Respondent's Motion to Dismiss; Memorandum of Points and Authorities in Support of Motion, c/s.

February 3, 1971 Order Entered: Respondent's Motion to Dismiss is Denied; Writ of Habeas Corpus to issue returnable March 2, 1971, 2:00 p.m. Attested copy to R. Jackson Rose, Asst. Atty. Gen., State of Tenn. and to Petitioner Henderson, Brushy Mtn. State Prison, Petros.

Relevant Docket Entries

April 12, 1971 Order Entered: Indictment and all proceedings based thereupon are void and of no legal effect; incarceration repugnant to U. S. Constitution; Petitioner released from custody of respondent. Two att. copies delivered to U. S. Marshal for service upon Warden, Brushy Mountain Prison; att. copies mailed to Petitioner and to R. Jackson Rose, Esquire.

April 30, 1971 Filed: Notice of Appeal filed on behalf of Respondent, c/s.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

[fol. 1]

WILLIE LEE HENDERSON

VS.

LEWIS S. TOLLETT, Warden,
Brushy Mountain State Prison

Civil No. 5996

**ORDER**

(Received for Entry 3:00 P.M., December 29, 1970)

The clerk will file the petition of Willie Lee Henderson for writ of habeas corpus in forma pauperis.

Petitioner alleges that he is presently incarcerated in the Brushy Mountain Prison at Petros, Tennessee, where he is serving a sentence of ninety-nine years, imposed in 1948 following his plea of guilty to a charge of first degree murder in Davidson County, Tennessee. He contends that said confinement is illegal, and he bases his contention upon several grounds.

(1) Petitioner asserts that, following his arrest on January 23, 1948, he was forced to sign a statement admitting his guilt "by being whipped" by the police in the absence of counsel. (2) He asserts that he was afforded no counsel at his preliminary hearing. (3) He asserts that on March 12, 1948—the date upon which his sentence was imposed, but several days before his trial was scheduled—he was taken from the county jail in which he was then confined to the office of the prosecuting attorney, where, in the absence of his retained counsel, he was

[fol. 2] "induced" to enter a plea of guilty by being threatened with the elctric chair. And (4) he asserts that he was indicted by a grand jury from which members of petitioner's race (Negro) were systematically excluded.

With regard to the first three of the above-stated grounds, petitioner does not assert, nor does his petition otherwise indicate, that he has at any time raised them in state court proceedings and pursued them to exhaustion therein. Since, in the absence of circumstances not present in the case at bar, an affirmative showing of such exhaustion of state remedies is required by 28 U.S.C. §2254 before federal habeas corpus relief will lie, this court cannot consider the first three of petitioner's grounds for relief until such a showing is made, either by amendment or in a new petition. Petitioner's fourth ground, however—that of systematic exclusion of Negroes from the grand jury which indicted him—presents a different situation.

It appears that petitioner first raised this ground in the courts of Tennessee by means of a petition for habeas corpus.[1] The trial court denied the petition without a hearing, and petitioner appealed. Ultimately, the Supreme Court of Tennessee, in an unpublished opinion filed November 3, 1967, in the case of Willie Lee Henderson v. C. Murray Henderson, remanded the case and ordered that an evidentiary hearing be held. A hearing was held, and, as stated by Judge Oliver, "[u]pon the evidence introduced at that hearing there can be no doubt whatever

[1] This statement, as well as the following brief summary of the state proceedings in which petitioner has been involved, is based upon Judge Oliver's dissenting opinion in the case of Henderson v. Russell, filed July 6, 1970, by the Tennessee Court of Criminal Appeals.

[fol. 3] that Negroes were deliberately and systematically excluded from the Grand Jury which returned the indictment against this petitioner." Nevertheless, in the face of such evidence, the trial court again dismissed the petition. On appeal, the Tennessee Court of Criminal Appeals, in an opinion by Judge Walker, affirmed the decision of the trial court on the ground that petitioner had waived his right to challenge the composition of the grand jury which indicted him. State of Tennessee, ex rel. Willie Lee Henderson v. Lake F. Russell (July 6, 1970). The court was divided, however, with Judge Oliver dissenting (as indicated above) and Judge Galbreath concurring. Though Judge Galbreath stated that he concurred "completely with Judge Walker's opinion," because "[t]he law that failure to make an objection to the racial composition of a Grand Jury is waived unless raised by an appropriate pretrial motion is too well settled for this Court to disturb," he went on to state that "I recognize the irrationality of the law as it applies to ancient cases of this type. No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade." He concluded that " ... the law is as set forth in Judge Walker's opinion; and it must be changed, if ever it is (and I personally believe it will be soon or late), by an authority higher than this Court."

Petitioner next sought a writ of certiorari from the Supreme Court of Tennessee. The Supreme Court denied the petition on September 8, 1970, and, in effect, affirmed the decision of the Tennessee Court of Criminal Appeals.

[fol. 4] It is thus clear that petitioner has, indeed, complied with the exhaustion requirement of 28 U.S.C. §2254.

This court is of the opinion that the allegations of the instant petition raise constitutional issues of importance. However, more information is of course required before this court can grant or withhold relief. Accordingly, it is hereby ORDERED that respondent, within twenty (20) days from the entry hereof, show cause why the writ should not issue. It is suggested that a copy of the opinion of the Supreme Court of Tennessee rendered in the case of Willie Lee Henderson v. C. Murray Henderson (filed November 3, 1967) and a copy of the transcript of the evidentiary hearing which was held as a result of that opinion be submitted to this court along with the response.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

[fol. 1]

# IN THE UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NASHVILLE, TENNESSEE

Willie Lee Henderson,
Petitioner

v.

Lewis Tollett, Warden
Tennessee State Penitentiary
Petros, Tennessee,
Respondent

Civil No. 5996

## PETITION FOR A WRIT OF HABEAS CORPUS

(Filed December 29, 1970)

The Petitioner petitions this Court for the issuance of a Writ of Habeas Corpus pursuant to Title 20, U.S.C., section 2241:

MAY IT PLEASE THE COURT:

Comes now the Petitioner, Willie Lee Henderson is filing the Petition for a Writ of Habeas Corpus, seeking his release from the Tennessee State Penitentiary, where he is confined under a sentence of 99 years on a conviction of the crime of First Degree Murder, he alleged that his conviction and sentence are void because he was deprived of his right by the City Police Department. Without anyone to advise him of his right to remain silent. It is in violation of both the Tennessee and United States Constitution, that stands in direct conflict with Article XIV, section 2, and Article VI of the United States Constitution Amendment, placing the Petitioner in involuntary servitude.

The Petitioner is ignorant of law, and denied access to legal Books of Law, and is destitute, so he therefore begs the Court tolerance to his ignorance, and conditions, and prays it will not bar him the equal and just consideration of this Court. He presents herein in the only and best manner he knows, the issues that traverse democratic principles, and he prays Judgment of these issues, and that the insufficient culmination of a layman's knowledge of law, or form, will not stay that Judgment.

Petitioner has exhausted state remidies by first going through the Lower State Courts, appealing to the Court of Appeals and last filed a Petition for a Writ of Certiorari to the Tennessee State Supreme Court, which was denied September 8, 1970. EXHIBITS ON BACK OF THIS PETITION.

## STATEMENT OF THE CASE

The Petitioner avers that on or about January 23, 1948, he was under arrest by City Detectives in the commission of a robbery and he was forced to signed statement, that he admitted the crime by being whipped by detectives and members of the City Police Department without having any Counsel to advise him of his right to ermain silent at the Police Department. How on the 26 day of January 1948, Petitioner was bound over to the Davidson County Criminal Court on a charge of assualt and battery with the intent to rob the said William H. Cotter, who was shot during the robbery and was not taken to a hospital until about 3;45 A.M. that Friday morning after being shot at a south Nashville whiskey store at 6:30 P.M. on the Thursday night of January 22, 1948, and he died 21 days after being shot. The death certificate clearly states that the cause of death was pneumonia.

The Petitioner further avers that he did not have any counselor at his preliminary hearing.

The Petitioner avers that on or about February 12, 1948 he was indicted along with John Thomas Shaw and Robert James Dobson by the Davidson County Grand Jury for murder in the first degree.

[fol. 2] The Petitioner further avers that he was indicted by a Grand Jury that did not have any Negroes on it. Also on March 12, 1948 Petitioner was forced to go on trial, Division One of Davidson County Criminal Court and placed before a Jury. Said Judge Chester K. Hart, presiding, and was sentenced to said confinement in the Tennessee State Penitentiary without any negro serviceing on the jury at the time of his trial. This were done without any Counsel being present to the case the introduction of evidence to establish the violation of Petitioner's right of counsel and not having negros on the jury, will explain facts is not in the record of his criminal court case no. 16323, it thus supplements, but does not contradict said record, and the introduction and consideration of such evidence is, therefore proper.

The record in Petitioner's murder case no. 16323, consists of the Presentment returned February 12, 1948, and the Minutes of Davidson County Criminal Court, Division One, for March 12, 1948, there is no reference in the record to indicate whether or not Petitioner was represented by counsel at any stage of the criminal proceedings, nor is there any affirmation showing of a waiver by Petitioner of his right to counsel.

ALLEGEMENT

Petitioner were suppose to be tried separate from the said two co-defendants, because he had not pleaded guilt

to said charge of murder in the first degree, as the said two co-defendants had. Therefore, his trial date was set for March 16, 1948, but on March 12, 1948, the trial date for the other two co-defendants, the Petitioner was taken from the county jail with said defendants to the prosecuting attorney's office by induced him to change his plea from not guilty to guilty by threatening to have him sent to the Electric Chair if he did not do so, and that this was in the absence of any attorney, representing Petitioner.

Since the Petitioner was threatened and induced in to pleading guilty in the absence of his paid attorney Tom Ed. Murry he believes the Court should have, or allowed him to contacted with a counsel before putting the Petitioner on trial before his scheduled trial date, by the court doing neither of the afore said this deprived the Petitioner of his constitutional right.

The legal principle is well settled that, the right to be represented by counsel is a fundamental right, going to the very basis of the administration of the criminal law, and places on the trial Judge the onus to inform the defendant of his rights amounts to a denial of the right. ---- The failure of the court to so inform him or to appoint a counsel for him, was fundamental error, stated in the Tennessee State Supreme Court acknowledge this rule to be the law in the case of Lynch vs. State, Ex rel.; Killebrew, 179 Tennessee 339, 166 S.W. 2d 397 (1941) in 39 C.T.S. Habeas Corpus, section 18; it clearly states, that the remedy of habeas corpus will lie to attack a conviction based on an unconstitutional or invalid statute. Stated in Com. vs. Smith, 11 A. 2d 656, 139 Pa. Super 357 (1940); Com. vs. Richards, 111 Pa. Super 124, quoted by Keller, Jg.. On or about March 26, 1964, the New

York U.S. Court of Appeals, issued a 6-2 ruling that widened the application of last years U. S. Supreme Court ruling requiring that a lawyer be provided for indigent persons charged with serious crime, even if they plead guilty.

In the case of Marbury vs. Madison, 1 Cranch 137, (1803) in the Supreme Court of the United States, Chief Justice Marshall wrote the opinion of the court saying, in part, -- "A law repugnant to the constitution is void ...., it is emphatically, to say what the law is ..." Composed solely of white persons with the design being to further deprive the Petitioner of the equal protection and due process of the law; the Petitioner offers the following: Congress has expressly forbidden the exclusion of a citizen from service as a Grand or Petit Juror in any state court, on grounds of race or color."

In the case of Patton vs. Mississippi, 332 U.S. 463, 6A Sup. Ct. 92, L. Ed. 72 (1947), Mr. Justice Black, writting for a unaminous court, wrote in part;"

Davidson County Criminal court held that wxclusion of negros from Grand and Petit Juries solely because of race denied negro defendants in criminal cases the equal protection of the laws, required by the Fourteenth (14) Amendment--- A long and unbroken line of our decisions since then has reiterated that principles, regardless of whether the discrimination was embodied in statute, or was apparant from the administrative practice of state jury selection officials; and regardless or whether the

[fol. 3] system for depriving defendants of their right was ingenuous or ingenidus: Griffin Et Al, vs. Illinois, 351 U.S. 95: "The United States Supreme Court in the case of Powell vs. Alabama, 287 U.S. 45 (1932) and

Norris vs. Alabama, 294 U.S. 587 (1935), upset the convictions on the grounds that the county in which they were tried had failed to summon qualified Negros for grand jury service." For example, in the so-called Scottsboro case in which negros had been indicted and convicted in the Alabama Courts for astatutory offense; the United States Supreme Court upset a conviction on the grounds that the lower courts had inadequate provision for counsel for the accused and invalidated and indictment had been returned had failed for more than a generation to summon qualified negros for grand jury service."

The United States Supreme Court meanwhile, has again remanded the case of Edgar Labat vs. Louisiana to the Federal District Court for Eastern Louisiana. The constitutional issue currently involved is systematic exclusion of negros from Grand or Petit Juries."

Under the law Jury Commissioner are under the duty not to pursue a course of conduct in the administration of their office which would operate to discriminate in the selection of Jurors on racial grounds: Lassell vs. Texas, 339 U.S. ____, Hill vs. Texas, 316 U.S. 400, 404."

By the above dictums of the Unitde States Supreme Court, the Grand Jury which returned the indictments against the Petitioner was illegally constituted thus rendering the indictments and the convictions unconstitutional null and void. Even if it be deemed that the only way the Petitioner could make an attack on the systematic exclusion of negros from serving as grand jurors would be to do so in a direct appeal which the Petitioner do not concede. The cases are legion which holds that he can make an attack on the systematic exclusion of negros from serving as grand jurors, in a habeas corpus proceedings. see Carruthers vs. Reed, (C.C.A.B., Cir.) 102 F.2d 933..

"--Exclusion of negros from serving as grand jurors in criminal prosecutions, constitutes a denial of the equal protection of the law and are grounds for relief by habeas corpus proceedings". The Petitioner is also a meritorious challenge to Davidson County Criminal Court of Tennessee's jury selection system, a system that not only systematically excludes negros from its services, but also a system that is in open defiance to the laws of the State of Tennessee Governing Jury selections; and further in open violation to the Fourteenth (14) Amendment to the United States Constitution of the America:"

Grand Jury are to be selected in the following manner, under Tennessee Law: "10021 5B 27 (4015) formed by lots." To form.

The six amendment provides in part that in all criminal prosecations, the accused shall enjoy the right ---- to be confronted with the witnesses against him --- and to have assistance of counsel for his defence." Gideon vs. Wainwright, 372 U.S. 325 in violation of Texas penal code art. 1408 at this hearing, 375, S.W.2d 293, we granted certiorari to consider the important constitutional question the involves, 379 U.S. 815, White vs.. Maryland, 373 U.S. 59; Hamilton vs. Alabama, 368 U.S. 52; 372, U.S. at 342; Malloy vs. Hogan, 378 U.S. 1, 378 U.S. at 6; Murphy vs. Waterfront Comm'n, 378 U.S. 52. see E.G. 5 Wigmore; evidence (1367) 3d Ed. (1940); Kirby vs. United States, 174 U.S. 47, 55, 56.; Alford vs. U.S., 282 U.S. 687, 692; Greene vs. McElroy, 360 U.S. 474, 360 U.S. at 496-497; In Re Oliver, 333 U.S. 257 by counsel 333 U.S. at 273; Turner vs. Louisiana, 379 U.S. 446, 472-473; Willner vs. Committee, 373 U.S. 96, 103-104; West vs. Louisiana, 194 U.S. 258, 264; Stein vs. New York, 346 U.S. 156, 195-196; Dowdell vs. United States,

221 U.S. 325, 330; Motes vs. United States, 178 U.S. 458, 474; Mattox vs. United States, 156 U.S. 237, 242 243; Cf. Hopt vs. Utah, 110 U.S. 574, 581; Queen vs. Hepburn, 7 Cranch 290, 295; Cohens vs. Virginia, 6 Wheat, 264, 387 (1821); Chambers vs. Florida, 309 U.S. 227, 235, 238, (1940); Lumber co. vs. United States, 251 U.S. 385, 392 (1920).

Upon the foregoing statements and facts, the Petitioner is duly entitled to the redress sought in this petition, because the Petitioner's Constitutional Rights, as a citizen of the state of Tennessee, and also as a citizen of the United States of America, has been violated and as such that he is now being held in the Tennessee State Penitentiary, under a sentence of 99 years that is unconstitutional null and void.

[fol. 4] Wherefore the Petitioner, Willie Lee Henderson, respectfully moves the court to issue a writ of habeas corpus to the Respondent, Mr. Lewis Tollett, Warden of the Tennessee State Penitentiary at Petros, Tennessee, commanding him to appear with the body of the Petitioner, on a date certained to be named and to show cause why the Petitioner should not be released from this unconstitutional and illegal confinement.

Respectfully Submitted

/s/ Willie Lee Henderson
Petitioner

[Affidavit of Mr. Henderson and Motion for Leave to Proceed in Forma Pauperis Omitted in Printing]

[fol. 1]

# IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[Title Omitted in Printing]

## NOTICE OF FILING DOCUMENTS

(Filed January 18, 1971)

Please take notice that certified copies of the following documents have this day been filed with the U. S. District Court Clerk at Nashville for use as evidence in connection with the above styled case. These documents are the records in the case of State of Tennessee, ex rel, Willie Lee Henderson vs. Lake Russell, Warden, Criminal Court of Davidson County, Case No. 4662 in that court.

1. Technical record in Criminal Court of Davidson County.
2. Bill of Exceptions, Criminal Court of Davidson County.
3. Exhibits to the Bill of Exceptions.
4. Brief on behalf of petitioner in the Court of Criminal Appeals.
5. Reply brief for the State of Tennessee in the Court of Criminal Appeals.
6. Petition for Writ of Certiorari to the Tennessee Supreme Court.
7. Reply of State to the petition for Writ of Certiorari.

[fol. 2]

Respectfully submitted,

/s/ R. Jackson Rose
R. JACKSON ROSE

Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219
741-2865

[Certificate of Service Omitted]

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[fol. 1]

## IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[Title Omitted in Printing]

## MOTION TO DISMISS

(Filed January 18, 1971)

Comes the respondent, Lewis S. Tollett, by and through the Attorney General, and moves the Court as follows:

1. To dismiss the action because the petitioner has heretofore applied for a writ of habeas corpus in Federal Court.

/s/ R. Jackson Rose
R. JACKSON ROSE
Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219

[fol. 1]

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

WILLIE LEE HENDERSON

VS.

LEWIS S. TOLLETT, Warden,
Brushy Mountain State Prison

Civil No. 5996

ORDER

[Received for Entry 3:45 P.M., February 3, 1971]

This proceeding involves a petition for the writ of habeas corpus. Of the four grounds originally asserted for such relief, only one is herein at issue—i.e., whether the indictment pursuant to which petitioner was convicted and sentenced was, in fact, void for the reason that the indicting grand jury was one from which members of petitioner's race had been systematically excluded. In an order of this court filed December 29, 1970, it was noted that this matter raises Constitutional issues of considerable importance, but that "... more information is of course required before this court can grant or withhold relief." Accordingly, it was ordered that respondent show cause why the writ should not issue. It was suggested that a copy of the opinion rendered by the Supreme Court of Tennessee in the case of Willie Lee Henderson v. C. Murray Henderson (filed November 3, 1967) and a copy of the transcript of the evidentiary hearing which was held as a result of that opinion be submitted to this court along with the ordered response. Such response has now been forthcoming, and it was accompanied by

[fol. 2] certain documents comprising the record of petitioner's habeas corpus proceeding in State court, which was initiated following the November 3, 1967, opinion, *supra*, and which was based upon the same contention as the instant petition. The Tennessee Supreme Court opinion of November 3, 1967, *supra*, was not, however, included. Nevertheless, this court is of the opinion that sufficient information has been furnished, and it is of the opinion that the writ must issue.

It appears from the record in its present state that petitioner first raised the racial exclusion issue in a State habeas corpus proceeding, Henderson v. Henderson, supra, wherein his petition was denied at the trial level without a hearing. Ultimately, however, the Tennessee Supreme Court reversed this denial and ordered that an evidentiary hearing be held. Apparently, petitioner was provided with court-appointed counsel who, in effect, elected to start the proceeding *de novo* by filing a second petition on January 12, 1968, in the Criminal Court of Davidson County, Tennessee (No. 4662). A hearing was held on the new petition, and a copy of the transcript of this hearing, as noted *supra*, has now been made a part of the record in the instant case. The evidence adduced at this hearing established without contradiction (a) that no Negro served on a Davidson County grand jury until some years after petitioner was indicted, despite the fact that roughly one quarter of the population of that county, at the time of petitioner's indictment, were members of that race and (b) that the names of black persons on the lists from which members of each grand jury were chosen at that time marked with the designations "c" or "col." for "colored." The trial judge held as a mat-

[fol. 3] ter of fact that no showing of systematic exclusion of blacks from the indicting grand jury

had been made. On appeal, a divided Court of Criminal Appeals, with apparent reluctance, affirmed the decision of the trial judge on the ground, simply stated, that regardless of whether or not a showing of systematic exclusion had been made at the hearing, petitioner had long since waived his right to complain thereof, (a) because he had failed to raise the issue by the procedures available to him at the time of his indictment and conviction, and (b) because his guilty plea had abrogated any defects in the indictment. Henderson v. Russell, No. 5996 (Tenn. Ct. Crim. App., filed July 6, 1970). This decision of the Tennessee Court of Criminal Appeals became the final ruling in the case, upon the Tennessee Supreme Court's denial of certiorari.

Before determining whether the writ should issue, the court must consider respondent's motion to dismiss this action on the ground that " ... petitioner has heretofore applied for a writ of habeas corpus in Federal Court." There being nothing in the record to show that the question now presented has been either raised or adjudicated in any prior proceedings in this court, and there being nothing to indicate that petitioner has, in earlier proceedings, deliberately withheld the newly-asserted ground or otherwise abused the writ as provided for in 28 U.S.C. §2244(b), the motion to dismiss is DENIED.

From a consideration of the whole record, it appears to the court that the writ must issue. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966), certiorari denied 386 U.S. 991 (1967).

Accordingly, the writ will issue, returnable before me March 2, 1971, at 2:00 p.m. It is so ORDERED.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

[fol. 1]

# IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

WILLIE LEE HENDERSON
Petitioner-Appellee

v.

LEWIS S. TOLLETT, WARDEN BRUSHY MOUNTAIN STATE FARM,
Respondent-Appellant

Civil No. 5996

## ORDER

(Received for Entry 10:50 A.M., April 12, 1971)

This proceeding involves a petition for the writ of habeas corpus. Petitioner is presently confined, in the custody of respondent, at the Brushy Mountain Prison, Petros, Tennessee, where he is serving a sentence of ninety-nine years which was imposed by the Criminal Court of Davidson County, Tennessee, following his plea of guilty, in 1948, to a charge of murder in the first degree. In his *pro se* petition, petitioner sets forth four grounds upon which he bases his claim that his present incarceration is illegal. With regard to the first three of his asserted grounds, petitioner makes no affirmative showing, nor does he otherwise indicate, that he has ever presented them for adjudication to the courts of Tennessee. Since a showing of exhaustion of available state remedies is required by 28 U.S.C. §2254 before federal habeas corpus relief can issue, this court, by order entered December 29, 1970, refused to take cognizance of peti-

tioner's first three grounds for relief. As his fourth ground for relief, petitioner asserts that his
[fol. 2] present confinement is illegal, because he was indicted by a grand jury from which members of his race (Negro) had been systematically excluded.

With regard to this fourth ground, the petition contains the required showing of exhaustion of available state remedies. Additionally, as was noted by this court in its order of December 29, 1970, this ground raises constitutional issues of considerable magnitude. Accordingly, the aforesaid order directed respondent to show cause why the writ should not issue. The directed response was subsequently forthcoming, and, no satisfactory cause to the contrary appearing therein, it was ordered that the writ issue and that petitioner be brought before this court at an appointed time for a hearing. The hearing was held as ordered, and, as a result thereof, the following have been established as the basic facts of the case.

Petitioner, a black youth, was indicted by the Davidson County Grand Jury in 1948 on a charge of murder in the first degree. Although roughly one fourth of the population of Davidson County in 1948 was composed of members of petitioner's race, no black people served on the grand jury which indicted him; no black people had ever served on a Davidson County Grand Jury prior to the time of his indictment; and no black people served on the Davidson County Grand Jury until well into the next decade following his indictment. What is more, whenever the name of a black citizen appeared on the venire lists from which members of the Davidson County Grand Jury were chosen at the time of petitioner's indictment, it was marked with either the designation "c" or the designation "col" to signify that the bearer of the name was "colored." Peti-

[fol. 3] tioner was represented by counsel who failed to object to the composition of the indicting grand jury, quite simply, because the possibility never occurred to him. For the same reason, he never apprised petitioner of the possibility of attacking his indictment on that ground, and petitioner himself, a twenty-year-old with less than a sixth grade education, never thought of the possibility on his own. Ultimately, petitioner pleaded guilty (he now claims as the result of coercion and trickery, but that is irrelevant in the present context) and was sentenced to serve a term of ninety-nine years in prison.

After serving some two decades in prison, petitioner collaterally attacked his sentence in a state habeas corpus proceeding on the ground that he had been indicted by a racially-exclusive grand jury. His petition was denied at the trial level without a hearing. Eventually, however, the Supreme Court of Tennessee reversed this denial and ordered that an evidentiary hearing be held on petitioner's allegations. Apparently petitioner was provided with court-appointed counsel who, in effect, elected to begin the proceeding *de novo* by filing a second and somewhat more sophisticated petition, based upon the same ground, in the Criminal Court of Davidson County (No. 4662) on January 12, 1968. A hearing was held on the new petition, and at that hearing all of the facts recited above were adduced. Nevertheless, the trial judge found as a matter of fact that there had been no systematic exclusion of Negroes from the grand jury which had indicted petitioner, and, accordingly, the petition was denied.

Petitioner appealed, and a divided Court of Criminal Appeals of Tennessee, with apparent reluctance, affirmed the decision of the trial judge. The appellate court did

not, however, affirm the trial judge's finding of fact that there had been no systematic exclusion of Negroes from the Davidson County Grand Jury in 1948. Rather, it based its decision on the ground that, regardless of [fol. 4] whether petitioner was correct or not in contending that members of his race had been systematically excluded from the grand jury which had indicted him,[1] he had waived all right to complain of the grand jury's composition, (a) because he had failed to raise that issue by means of the procedural devices available to him at the time of his indictment and conviction, and (b) because his plea of guilty had abrogated any defects which the indictment might have contained. *Henderson v. Russell*, No. 5996 (Ct. Crim. App. Tenn., filed July 6, 1970). This decision by the Court of Criminal Appeals of Tennessee became the final state court ruling in the case upon denial of certiorari by the Supreme Court of Tennessee. Finally, having thus exhausted his available state remedies, petitioner sought federal habeas corpus relief. It remains, then, to consider whether such relief shall be granted.

(I) The constitutional issue: indictment of a black man by a grand jury from which members of his race have been systematically excluded.

The unconstitutionality of racially-exclusive grand juries, insofar as their actions affect members of the excluded race, has been firmly established since at least as early as 1880. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Neither an in-depth analysis of the facts of the instant case nor a lengthy citation of authorities is

[1] The clear implication of the three opinions rendered in the case is that the members of the Court of Criminal Appeals of Tennessee felt that petitioner's contention was correct.

required to support the proposition that petitioner's showing of the total absence of members of his race [fol. 5] from the Davidson County Grand Jury in 1948 and prior years constitutes proof of a *prima facie* case of systematic exclusion of such persons, thereby casting the burden on respondent to prove to the contrary. *Whitus v. Georgia*, 385 U.S. 545 (1967). This burden respondent clearly has failed to sustain. Moreover, and rebuttal proof which respondent might have offered would have been essentially ineffective in the face of petitioner's showing that the names of black people were given distinguishing marks whenever they appeared in the venire lists from which Davidson County Grand Jurors were chosen at the time of his indictment, for it is obvious that such " ... marking of the jury ... [lists] with the letter "C" [or with the abbreviation "col"] to indicate persons of the Negro race constituted a purposeful discrimination which is unlawful under the Federal Constitution." *Bonds v. State*, 421 S.W.2d 87, 90 (S. Ct. Tenn. 1967). It is thus ineluctable that petitioner was indicted by an unconstitutionally-composed grand jury, and it is also ineluctable that such a body is legally not a grand jury at all.

(II) The waiver issue: effect of petitioner's failure to object, at the time of his indictment or shortly thereafter, to the racial composition of the grand jury which indicted him.

Respondent concedes—as it is apparent he must—that petitioner has proved everything necessary fully to support his contention that members of his race were systematically excluded from the grand jury which indicted him. He thus asserts " ... that the only [remaining] issue is whether or not the petitioner has waived his

rights to question the composition of the [indicting] grand jury ...," and he strenuously insists that petitioner has indeed waived such rights. This court does not agree.

[fol. 6]

With all deference to what respondent refers to as a "long line of cases" in Tennessee which appear to hold otherwise, this court feels it is illogical to contend that either petitioner's failure timely to object to the composition of the indicting grand jury or his subsequent entry of a guilty plea constitutes a waiver, by operation of law, of his right to object to the composition of that grand jury at the present time. Such a contention, as pointed out by Judge Oliver in his well-reasoned and convincing dissent in *Henderson v. Russell*, *supra*, rests upon a confusion between an indictment which is merely technically defective and one—such as petitioner's—which is a complete nullity.[2] In the latter case, stated in the simplest of terms, there is no "defect" in the indictment to waive, for there is in fact no "indictment" to contain such a defect: instead, there is merely a sheet of paper, meeting, to be sure, the facial requisites of a valid indictment, but having in actuality no legal effect whatsoever. It is clear that any criminal prosecution brought incident to such an "indictment" is illegal and that a plea of guilty to such an "indictment" is of no binding effect, for such an "indictment" confers no subject-matter jurisdiction on the sentencing court. *State v. Hughes*, 371 S.W.2d 445 (S. Ct. Tenn. 1963); *Robinson v. City of Memphis*, 277 S.W.2d 341 (S. Ct. Tenn. 1955); and cases cited in *Henderson v. Russell*, *supra*, (Oliver, J., dissenting).

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[2] Thus, for example, in the case of Bonds v. State, supra, an indictment rendered by a racially-exclusive grand jury in Williamson County " ... dismissed as void" by the Supreme Court of Tennessee (and this despite the fact that, strictly speaking, defendant's challenge to the racial composition of the indicting grand jury was not timely raised.)

[fol. 7] Respondent places great store in the fact that a defendant in federal court may, under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, waive the right to complain of the racial composition of the grand jury which indicted him if he fails to raise that issue at a specified stage in the proceeding. Indeed, the crux of his entire position with regard to waiver seems to be the proposition that if unconstitutionality of grand juries may be waived in federal court, then the same rule should apply to state court proceedings. His basic assumption is that, if petitioner had been indicted by a federal grand jury and sentenced by a federal judge, then he would now be precluded from objecting to the racial composition of the indicting grand jury. From this premise, respondent infers that the same result should be effected in the case at bar.

This court is not persuaded by respondent's argument and is of the opinion that it fails for at least three reasons: (1) his basic assumption is factually incorrect; (2) even if his basic assumption were true, a waiver under Rule 12 is not analogous, in terms of what is actually waived, to the waiver assertedly made by the instant petitioner; and (3) ignoring completely (1) and (2), *supra*, the case law is clear as to the test for waiver which this court must apply in the case at bar, and, applying that test, it is inescapable that petitioner has waived nothing. A brief amplification of the foregoing considerations is here in order.

(1) Rule 12(b)(2), Federal Rules of Criminal Procedure, provides that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment ..." must be raised before trial, otherwise they are waived. In his brief, respondent sets forth pertinent

[fol. 8] portions of the Notes of Advisory Committee on Rules to point out that "[i]llegal selection or organization of the grand jury" is one of the defenses or objections thus subject to waiver, and he cites several federal cases which refuse, on grounds of waiver under Rule 12, to permit the challenge of indictment by racially-exclusive grand juries to be raised.

Nevertheless, respondent's brief omits an important consideration, namely, the fact that Rule 12(b)(2) expressly provides that the defense of lack of jurisdiction is not waived by failure to raise it before trial. It is indeed difficult, if not impossible, to conceive how the rule could provide otherwise, for it is axiomatic in Anglo-American jurisprudence that one cannot waive lack of jurisdiction, even if one so wishes. And, as noted above, a void indictment, under the law of Tennessee, confers no subject-matter jurisdiction on the sentencing court. Hence, Rule 12, by its very language, would not necesitate a finding of waiver in the case at bar, even if it were applicable herein.

Further, Rule 12(b)(2) also provides that, in the case of those defenses and objections which are waived if not raised before trial, "... the court for cause shown may grant relief from the waiver." Respondent has not apprised this court of any reason why a court before which an individual's conviction is attacked collaterally may not likewise grant relief from such waiver, upon a showing of good cause. In the instant case, any number of factors have been established which suffice to constitute such a showing. Thus, if petitioner were held, by operation of law, at some point to have waived his right to challenge the racial composition of the grand jury which indicted him, it is readily apparent that this court could appro-

[fol. 9] priately grant relief from such waiver, even if Rule 12(b)(2) actually applied to the case at bar. It is clear from the foregoing considerations that respondent's basic premise is incorrect.

(2) Assuming, *arguendo*, that a waiver under Rule 12 were categorical and would admit of no exceptions, it would still avail respondent nothing to point to the situation in federal court and argue that the same considerations should apply in the case of the instant petitioner, for a waiver under Rule 12 is not analogous to the waiver assertedly made by this petitioner: what this petitioner has assertedly waived cannot be waived under Rule 12.

More specifically, this petitioner is attacking the racial composition of the grand jury which indicted him on the ground that that composition resulted from a selection process which denied him equal protection of the laws. Thus the part of the Constitution upon which the instant petition is based is the Equal Protection Clause of the Fourteenth Amendment, and the right which respondent contends petitioner is now precluded from asserting is the right to equal protection of the laws. The Equal Protection Clause is worded as follows: "[n]o *State* shall ... deny to any person within its jurisdiction the equal protection of the laws," (emphasis added) and it follows from this wording that, whatever may be the standard with which federal grand jury selection must comply, it is not the one set forth in the Equal Protection Clause of the Fourteenth Amendment[3] for that clause

[fol. 10] " ... effects a prohibition only on the states,"

[3] In actual effect, of course, the federal and the state standards are the same. Nevertheless, the rights which give rise to the respective standards are different: if a federal defendant complains of the racial composition of the grand jury which indicted him, he is in fact complaining that his

(Continued on following page)

*Washington v. United States*, 401 F.2d 915, 922 (D.C. Cir. 1968), and is thus inapplicable to the Federal Government, the Federal Judiciary, and the Federal Rules of Criminal Procedure. The sole point which this court wishes to stress in the present contenxt, however, is that, whatever it may be that a federal defendant waives under Rule 12(b)(2), it is clearly not the right to complain of a denial of equal protection of the laws by virtue of racially-exclusive grand jury selection. It follows that the waiver provision of Rule 12 is necessarily not analogous to the waiver which respondent asserts was made by this petitioner: the practice in federal court has no bearing whatever on the issue presently before this court, and the cases cited by respondent are inapposite in the present context.

(3) Finally, ignoring the foregoing considerations completely, it is readily apparent from the cases that respondent's argument with respect to waiver is not well taken. "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default," *Labat v. Bennett*, 365 F.2d 698, 707 (5th Cir. 1966), certiorari denied 386 U.S. 991 (1967), and the law is clear that "[a] procedural default, such as the one here in question, may not be regarded as a waiver unless it appears from the evidence that the default resulted from a

[fol. 11]

(Continued from preceding page)

Fifth Amendment rights have been violated, while when a state defendant makes the same charge, he is in fact complaining (as is this petitioner) of an abridgement of his Fourteenth Amendment rights. See e.g., Washington v. United States, infra. Thus, violation of the Equal Protection Clause of the Fourteenth Amendment is not a defense to a federal prosecution, at least insofar as is relevant here, and hence is not one of the matters that can be waived under Rule 12.

deliberate choice made by counsel and participated in by his client." *Wade v. Yeager*, 377 F.2d 841, 846 (3rd Cir. 1967), certiorari denied 393 U.S. 893 (1968). More specifically, as stated by the United States Supreme Court, "[t]he classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 ... furnishes the controlling standard .... [And] a state court's finding of waiver [does not] bar independent determination of the question by the federal courts on habeas [corpus], for waiver affecting federal rights is a federal question [citation omitted]." *Fay v. Noia*, 372 U.S. 391, 439 (1963). In short, regardless of whatever may be the procedural rule with respect to waiver in the criminal courts of Tennessee and regardless of whatever may be the federal practice in that regard, it is clear that the test for waiver which must be applied by this court in this case is the one expounded by the Supreme Court in the case of *Johnson v. Zerbst*, *supra*. It remains to examine that test in the light of the facts of the case at bar.

Under the holding in *Johnson v. Zerbst*, the " ... 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and ... 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, conduct, and experience of the accused." *Johnson*, *supra*, at 464 (citations omitted).

[fol. 12] Viewing this petitioner in the light of his experience and background at the time of his in-

dictment and conviction, it is readily apparent that the presumption against waiver set forth in *Johnson v. Zerbst* works conclusively to preclude a finding of waiver in his case, for there is nothing in the record which rebuts such presumption in any manner. However, petitioner need not place his reliance upon the effect of the presumption alone, for the uncontroverted evidence adduced in this case obviates the need for such reliance: this evidence establishes as a matter of fact that petitioner was unaware of so much as the remotest possibility of attacking his indictment on the ground herein at issue at the time the indictment was returned, at the time of his guilty plea and sentence, or at any other time until shortly before he actually raised the matter in his state habeas corpus petition. Clearly, under the *Johnson v. Zerbst* standard, petitioner cannot be held to have waived something of which he was not even aware.

It might be contended that, since the possibility of attacking an indictment on the ground that it was rendered by a racially-exclusive grand jury has long been available, *Strauder, supra*, petitioner's counsel should be charged with knowledge of such possibility and that such knowledge should, in turn, be imputed to petitioner. Such an argument is clearly not well taken in light of the fact that "[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948 ...." *Henderson v. Russell, supra*, (Galbreath, Jr., concurring). What is more, petitioner's attorney stated in an affidavit executed in conjunction with petitioner's state court proceeding [fol. 13] that, indeed, the possibility of raising the equal protection objection never occurred to him and that, in consequence, he never mentioned such possibility to petitioner. Given this latter fact, even if petitioner's

counsel had been well aware of the possibility of attacking petitioner's indictment on equal protection grounds, but had, through either choice or negligence, failed to assert such grounds in his client's defense, his failure could not, on the facts of this case, be imputed to petitioner, because "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief." *Fay v. Noia*, *supra*, 439.

In substance, shorn of the extraneous trappings of legal fiction, the outcome of this case turns upon the answer to the following simple question: Can a twenty-year-old black defendant, who had less than a sixth-grade education when he was charged with murder in 1948, be held intentionally to have relinquished or abandoned a known right or privilege by virtue of his failure, without contrary advice of counsel, to assert in his own defense the proposition that his indictment was constitutionally void in the light of the Equal Protection Clause of the Fourteenth Amendment, when, in fact, "[n]o lawyer in this State" would have thought of asserting such a defense? This court holds that he cannot. *Labat v. Bennett*, *supra*; *Ellzey v. Breazeale*, 277 F. Supp. 948 (S.D. Miss. 1967); *Gordon v. Breazeale*, 246 F. Supp. 2 (N.D. Miss. 1965).

It follows that petitioner's indictment and all proceedings based thereupon are void and of no legal effect. In consequence, his present incarceration is repugnant to the Constitution of the United States. It is, accordingly, ORDERED that he be released forthwith from the custody of the respondent.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

# IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE NASHVILLE DIVISION

[Title Omitted in Printing]

## NOTICE OF APPEAL

(Filed April 30, 1971)

Notice is hereby given that Lewis S. Tollett, Warden, Brushy Mountain State Prison, defendant above named, hereby appeals to the United States Court of Appeals for the Sixth Circuit from the order granting the release of Willie Lee Henderson, petitioner, entered in this action on the 12th day of April, 1971.

/s/ R. Jackson Rose
R. JACKSON ROSE
Assistant Attorney General
Supreme Court Building
Nashville, Tennessee 37219
741-2865
Attorney for Respondent,
Lewis S. Tollett

[Certificate of Service Omitted in Printing]

NO. 71-1451

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

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WILLIE LEE HENDERSON,
*Petitioner-Appellee*,

v.

LEWIS S. TOLLETT, Warden,
*Respondent-Appellant*.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

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Decided and Filed April 20, 1972.

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Before: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

[Opinion of Sixth Circuit Omitted because printed in Petition for Certiorari at pages 1a-12a]

# SUPREME COURT OF THE UNITED STATES

October 16, 1972

TOLLETT v. HENDERSON
No. 72-95

"The motion of respondent for leave to proceed in forma pauperis is granted. The petition for a writ of certiorari is granted."

## PROCEEDINGS IN STATE COURTS IN EARLIER HABEAS CORPUS CASE

The proceeding in an earlier Tennessee State court habeas corpus proceeding are attached to the "Notice of Filing Documents" filed in the U. S. District Court in this case January 18, 1971 (A. 16).

The pleadings filed from the case of *State of Tennessee, ex rel. Willie Lee Henderson v. Lake Russell, Warden*, No. 4662, in the Criminal Court of Davidson County* are reprinted as follows:

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* The exhibits, certified according to the Acts of Congress, have been sent by the Sixth Circuit Clerk to the Clerk of this Court.

* The only State Court proceedings not printed are the briefs in the Tennessee Court of Criminal Appeals, the petition for certiorari to the Tennessee Supreme Court and the brief in opposition to that petition.

[TECHNICAL RECORD]

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In The
COURT OF CRIMINAL APPEALS,
STATE OF TENNESSEE
At Nashville, Tenn.

APPEALED FROM
Davidson County Criminal Court Division Two
The Honorable John L. Draper, Judge, presiding

(DEFENDANT IN PENITENTIARY)

Certified Transcript Of Cause

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON

vs.

LAKE RUSSELL, WARDEN
TENNESSEE STATE PENITENTIARY

JUDGEMENT LOWER COURT

PETITION FOR WRIT OF HABEAS CORPUS

ATTORNEYS

Mr. Robert S. Brandt, Assistant Attorney General
6th Floor, Metropolitan Courthouse
For State

Appointed: Robert F. Hedgepath, Nashville

# IN THE COURT OF CRIMINAL APPEALS, NASHVILLE, TENNESSEE

| | |
|---|---|
| STATE OF TENNESSEE, ex rel., WILLIE LEE HENDERSON<br><br>VS.<br><br>LAKE RUSSELL, WARDEN, ETC. | Davidson County<br>(No. 4662 Below) |

## ORDER APPOINTING COUNSEL

In this cause it appearing to the Court that appointed counsel in the trial court was relieved for good cause shown, and that the plaintiff in error is not represented by counsel on appeal, and that he is a poor person without means for employing counsel.

It is, therefore, Ordered that the Honorable Robert F. Hedgepath be, and he is hereby, appointed as counsel for the said Willie Lee Henderson to take whatever action he deems necessary and proper in the best interests of the said Willie Lee Henderson on the appeal. 3/19/69.

Technical Record, State Criminal Court

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR HABEAS CORPUS

Received of Earl Hawkins, Criminal Court Clerk, the following exhibits in connection with the above styled cause:

Exhibit #1 to petitioner's case - Copy of minute entry.

Exhibit #2 to Petitioner's case - Affidavit of Tom Ed Murray.

Exhibit #3 to Petitioner's case - U. S. Department of Commerce Bureau of the Census - Washington.

Exhibit #4 to Petitioner's case - Minutes

Exhibit #5 - Certificate

This the ___ day of March, 1969.

_____

Technical Record, State Criminal Court

# I N D E X


| | |
|---|---|
| Amended Answer | 13 |
| Amended answer filed | 12 |
| Answer | 7 - 8 |
| Answer filed | 6 |
| Attorney relieved | 30 |
| Bill of Cost | 31 |
| Bill of Exceptions filed | 28 |
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| " May Term, 1968, Div. II | 14 |
| " September Term, 1968, Div. II | 16 |
| " January Term, 1969, Div. II | 25 |
| Certificate and seal | 32 |
| Demurrer | 9 |
| Motion to dispose of demurrer of respondent's answer, etc. | 10 |
| Motion for new trial | 23 |
| Motion for new trial overruled | 24 |
| Motion to place into evidence certified copies of records | 21 |
| Motion to be relieved as counsel | 29 |
| Opinion - Petition for writ of habeas corpus dismissed | 18 - 20 |

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Order allowing state to amend answer 11

Order denying prayer for dismissal of petition 15

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Pauper's Oath 27

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Petition for writ of habeas corpus filed 2

Petition for writ of habeas corpus under advisement 17

BILL OF EXCEPTIONS AND EXHIBITS FILED UNDER SEPARATE COVER.

[1]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION TWO MINUTES, JANUARY TERM, 8TH DAY OF JANUARY, 1968
MINUTE BOOK 64, PAGE 774

CAPTION
JANUARY
TERM
1968
DIV.
TWO

MONDAY, JANUARY 8, 1968

Pleas at the Courthouse in the City of Nashville, County of Davidson, State of Tennessee it being the January Term, the second Monday of January, 1968, and the eighth day of January thereof, and one hundred ninety second year of the American independence, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, towit:

Division Two of the Criminal Court of Davidson County, Tennessee, was duly opened by James Jones and Charles R. Hill, officers of this Court, and prayer was offered by Reverend Larry Sharp, Pastor of the Southern Methodist Church at Goodlettsville.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 12TH DAY OF JANUARY, 1968
MINUTE BOOK 65, PAGE 18

FRIDAY, JANUARY 12, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

| | |
|---|---|
| 4662 | STATE OF TENNESSEE, EX REL. |
| PETITION | WILLIE LEE HENDERSON, |
| FOR | PETITIONER |
| WRIT | |
| OF | VS. |
| HABEAS | C. MURRAY HENDERSON, WARDEN, |
| CORPUS | TENNESSEE STATE PENITENTIARY, |
| FILED | RESPONDENT |

PETITION FOR WRIT OF HABEAS CORPUS

A petition for a writ of habeas corpus was received by the Court in this cause and marked filed this date.

Mr. William S. Westerman, Attorney for Petitioner.

(A copy of the Petition follows)

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

# IN THE CRIMINAL COURT OF DAVIDSON COUNTY TENNESSEE, DIVISION TWO

STATE OF TENNESSEE ex rel.,
WILLIE LEE HENDERSON

PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY

RESPONDENT

No. 4662

## PETITION FOR A WRIT OF HABEAS CORPUS

(Filed January 12, 1968)

Petitioner would show to the Court that he is a citizen of the State of Tennessee and is illegally restrained of his liberty, as hereinafter set out, by Respondent at the Tennessee State Penitentiary at Nashville in compliance with an order of the Davidson County Criminal Court, Division I, which convicted petitioner of first degree murder and sentenced him to confinement for ninety-nine years. Said order dated March 12, 1948, is of record in the Davidson County Criminal Court Clerk's Office and is not annexed hereto because same is not in issue.

Heretofore, petitioner has filed two petitions for writs of habeas corpus, one of the 8th day of June, 1964, which was dismissed, and one on September 3, 1964 which was denied after a full evidentiary hearing on the meritorious allegations, which denial was affirmed by the Supreme Court on September 9, 1966. Since those proceedings did not raise the issue of systematic exclusion of members of petitioner's race from the grand or petit juries, and no

issue relevant to said petitions or proceedings is raised herein, copies of said petitions and proceedings are not annexed hereto.

[4]

Petitioner would show to the court that on and for many years prior to the date he was indicted by the Davidson County Grand Jury, February 12, 1948, none or very few members of petitioner's race, Negro, served on said Grand Jury; and that on and for many years prior to the date he was sentenced by a Davidson County petit jury, March 12, 1948, none or very few members of petitioner's race served on said petit juries. Petitioner alleges further that at and for an extended period of time prior to the time petitioner was indicted and sentenced, members of his race were systematically excluded from the grand and petit juries of Davidson County, Tennessee; and that said juries were improperly and unlawfully constituted as to petitioner in violation of the rights guaranteed petitioner by the Tennessee and United States Constitutions.

Petitioner would further show the Court that at the time of said indictment and trial he was not informed and had no knowledge of his right to properly constituted grand and petit juries, nor was he questioned or advised about said rights or about attacking said indictment or sentence on the grounds of deprivation of said rights. Petitioner would further allege on information and belief that the lawyer who represented him at the trial which resulted in the said conviction and sentence had no knowledge of systematic exclusion of members of the Negro race from the grand and petit juries connected with said trial and that his lawyer did not advise him with reference to said rights, nor did his lawyer attack said indictment or sentence on grounds of deprivation of said rights. Petitioner would further

show that he never expressly waived his right to challenge the constitution of said grand or petit juries and that none of his actions or failures to act constituted an

[5]

intelligent waiver of said constitutional right that members of his race not be systematically excluded from said grand or petit juries.

Premises considered petitioner prays:

1. That this matter be set for early hearing.

2. That the indictment on which the conviction and sentence are based and the sentence petitioner is presently serving be declared void and of no effect.

3. That a writ of habeas corpus issue to the defendant ordering that the body of petitioner be delivered to the Court.

4. That all necessary and proper proceedings be had hereunder.

5. That petitioner have such other, further and general relief as the nature of the case may require.

/s/ William S. Westerman
Court Appointed Attorney for Petitioner

STATE OF TENNESSEE )

COUNTY OF DAVIDSON )

Willie Lee Henderson, who being duly sworn makes oath that the statements and allegations in the foregoing petition are true, and that those matters alleged on information and belief, he verily believes to be true.

/s/ Willie Lee Henderson

Sworn to and subscribed before me this 5 day of January, 1968.

/s/ Jimmy W. Rose
Notary Public

My Commission expires: 24 Jan. 1970

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[6]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION II
MINUTES, JANUARY TERM, 16TH DAY OF JANUARY, 1968
MINUTE BOOK 65, PAGE 24

TUESDAY, JANUARY 16, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
ANSWER
FILED

STATE OF TENNESSEE, EX REL.
WILLIE LEE HENDERSON,
PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

An answer to the petition for writ of habeas corpus filed in this cause was received by the Court and marked filed this date.

Mr. Robert S. Brandt, Assistant Attorney General for the State.

(Copy of Answer follows)

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[7]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY TENNESSEE, DIVISION TWO

STATE OF TENNESSEE, ex rel
WILLIE LEE HENDERSON

Petitioner

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY
NASHVILLE, TENNESSEE

Respondent

NO. 4662

ANSWER

(Filed January 16, 1968)

Respondent, C. Murray Henderson, for answer to the writ of habeas corpus filed against him in this cause says:

That he admits he is in official custody of the petitioner but denies that said custody is illegal or unlawful.

I.

Respondent would show to the Court that the allegations of the petitioner that none or very few members of petitioners race served on the grand and petit jury which indicted and tried him are insufficient as a matter of law. Petitioner cites no statistics or other pertinent data which would show to the Court that members of his race were systematically excluded from the grand and petit jury. A mere naked allegation of systematic exclusion is insufficient to raise a question: See *Whitus v. Georgia*, 385 U.S. 545 (1967), *Swain v. Alabama*, 380 U.S. 202 (1965), *Brown v. Allen*, 344 U.S. 443 (1952), and *Patton v. Mississippi*, 332 U.S. 463 (1947). All of these cases hold that there must be a statistical showing of imbalance of certain proportion before a prima facie case of systematic exclusion will be made. Also important is this Court's decision in the case of State of Tennessee v. James Walden and Norris Givens in which this Court

[8]

held that Negroes were not systematically excluded from grand juries in Davidson County, Tennessee.

II.

The Respondent would show to this honorable Court that the petitioner failed to raise the question of systematic exclusion of Negroes from the grand jury which indicted him at the proper time. That question must be raised prior to the entering of a plea to an indictment. Petitioner's attorney at his trial and conviction was on notice that it was illegal to systematically exclude Negroes from the grand juries. The case of *Strauder v. West Virginia*, 100 U.S. 303 (1879) was decided in 1879 and has been the

law since that date. It was held in that case that Negroes could not be excluded by law from serving on a grand jury. There appears to be no explanation advanced for the failure of the defendant to raise the question at the proper time.

III.

Respondent urges this Court that the defendant is seeking to make a collateral attack on a valid conviction and judgment of the Criminal Court of Davidson County, Tennessee. It is a well settled proposition of law that a habeas corpus cannot be used to make a collateral attack upon a valid Court judgment.

Now, having fully answered, the Respondent prays that the petition for writ of habeas corpus filed against him in this cause be dismissed and that the petitioner be returned to him for further custody.

Respectfully submitted,

/s/ Robert S. Brandt
Robert S. Brandt
Assistant District Attorney

[Certificate of Service Omitted in Printing]

Technical Record, State Criminal Court

[9]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 18TH DAY OF JANUARY, 1968
MINUTE BOOK 65, PAGE 31

THURSDAY, JANUARY 18, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
DEMURRER

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner demurs to Respondent's answer on the grounds that it fails to address itself to the factual allegations in the petition and therefore is insufficient as a matter of law.

/s/ William Westermann
Court Appointed Counsel for Petitioner

[Certificate of Service Omitted in Printing]

Filed Jan. 18, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[10]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM 21ST DAY OF FEBRUARY, 1968
MINUTE BOOK 65, PAGE 182

WEDNESDAY,, FEBRUARY 21, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
MOTION

STATE OF TENNESSEE, EX REL.
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN,
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

**MOTION**

Comes the petitioner and moves the Honorable Court:

1. To dispose of his demurrer to respondent's answer;

2. To dispose of the issue of legal sufficiency of petitioner's amended petition, which issue is raised by respondent's answer; and

3. To allow an early separate hearing on the issue of whether petitioner waived his right to challenge the constitution of the grand and petit juries.

/s/ William Westermann
Attorney for Petitioner

[Certificate of Service Omitted in Printing]

Filed Feb. 21, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

ORDERED THAT COURT STAND ADJOURNED UNTIL TOMORROW MORNING AT NINE O'CLOCK.

/S/ JOHN L. DRAPER, JUDGE

[11]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM 2ND DAY OF APRIL, 1968
MINUTE BOOK 65, PAGE 341

TUESDAY, APRIL 2, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
ORDER
ALLOWING
STATE
TO
AMEND
ANSWER

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

ORDER

It appearing to this Court that the State should be allowed to amend its answer in the above styled cause, IT IS ORDERED, ADJUDGED, AND DECREED by this Court that the respondent be allowed to file an amended answer.

/s/ John L. Draper
JOHN L. DRAPER, JUDGE

Approved for entry:

/s/ William Westerman
Attorney for Petitioner,
WILLIAM WESTERMANN

/s/ Robert S. Brandt
Attorney for Respondent,
ROBERT S. BRANDT

Filed: April 2, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

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[12]

MINUTES, JANUARY TERM, 2ND DAY OF APRIL, 1968

4662
AMENDED
ANSWER
FILED

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

An amended answer was received by the Court in this cause and marked filed this date.

Mr. Robert S. Brandt, Assistant Attorney General for the State.

(Copy of Amended Answer follows)

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

Technical Record, State Criminal Court

[13]

# IN THE CRIMINAL COURT OF DAVIDSON COUNTY TENNESSEE, DIVISION TWO

STATE OF TENNESSEE, ex rel
WILLIE LEE HENDERSON

Petitioner

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY
NASHVILLE, TENNESSEE

Respondent

NO. 4662

## AMENDED ANSWER

(Filed April 2, 1968)

Respondent, C. Murray Henderson, for amended answer to the writ of habeas corpus filed against him in the above cause says:

The petitioner alleges that members of his race were systematically excluded from the Davidson County Grand Jury which indicted him. The respondent categorically denies that members of the Negro race were systematically excluded from the Davidson County Grand Jury.

Now having fully answered, the respondent prays that the petition for writ of habeas corpus filed against him in this cause be dismissed and that the petitioner be returned to him for further custody.

Respectfully submitted,

Technical Record, State Criminal Court

/s/ Robert S. Brandt
Robert S. Brandt
Assistant District Attorney

[Certificate of Service Omitted in Printing]

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[14]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, MAY TERM, 6TH DAY OF MAY, 1968
MINUTE BOOK 65, PAGE 435

MONDAY, MAY 6, 1968

CAPTION
MAY
TERM
1968
DIV.
TWO

Pleas at the Court House in the City of Nashville, County of Davidson, State of Tennessee, it being the May Term, 1968, the first Monday, in May, 1968, and the 7th day of May, thereof, and one hundred ninety second year of American independence present and presiding the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had to wit:

Division Two of the Criminal Court of Davidson County, Tennessee, was duly opened by Walter M. Parrish and Frank M. Bess, Jr., officers of this Court, and prayer was offered by the Reverend Giles E. Lewis, Jr., Rector of St. Bartholomew's Episcopal Church.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[15]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, MAY TERM, 6TH DAY OF MAY, 1968
MINUTE BOOK 65, PAGE 449

TUESDAY, MAY 7, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

| | |
|---|---|
| 4662 ORDER DENYING PRAYER FOR DISMISSAL OF PET. | STATE OF TENNESSEE, EX REL WILLIE LEE HENDERSON, PETITIONER<br>VS.<br>C. MURRAY HENDERSON, WARDEN, TENNESSEE STATE PENITENTIARY, RESPONDENT |

PETITION FOR WRIT OF HABEAS CORPUS

ORDER

In this cause it is the opinion of the Court that the prayer of the District Attorney representing the respondent for a

dismissal of the petition for a writ of Habeas Corpus should be and is denied.

The cause will be set for hearing at an appropriate time.

This, the 7th day of May, 1968.

/s/ John L. Draper
JUDGE

Filed: May 7, 1968
Earl Hawkins, Clerk
By J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[16]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SPETEMBER TERM, 9TH DAY OF SEPTEMBER, 1968
MINUTE BOOK 65, PAGE 754

MONDAY, SEPTEMBER 9, 1968

| | |
|---|---|
| CAPTION<br>SEPTEMBER<br>TERM<br>1968<br>DIV.<br>TWO | Pleas at the Courthouse in the City of Nashville, County of Davidson, State of Tennessee, it being the September Term, 1968, the second Monday in September, 1968 and the 9th day of September, thereof, and one hundred ninety third year of American independence, present and presiding, the |

Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

Division Two of the Criminal Court of Davidson County, Tennessee, was duly opened by Mr. H. L. Demonbreun and Mr. N. L. Luther, officers of this Court.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[17]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 24TH OF OCTOBER, 1968
MINUTE BOOK 66, PAGE 152

THURSDAY, OCTOBER 24, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, to wit:

| | |
|---|---|
| 4662 | STATE OF TENNESSEE, EX REL |
| PETITION | WILLIE LEE HENDERSON |
| UNDER ADVISEMENT | VS. |
| | LAKE F. RUSSELL, WARDEN |
| | TENNESSEE STATE PENITENTIARY |

PETITION FOR WRIT OF HABEAS CORPUS

Came the Attorney General who prosecutes for the State and the petitioner in person.

Thereupon, this cause was heard by the Court upon the petition for writ of habeas corpus and after having heard the proof and argument of counsel said petition was taken under advisement until a later date.

Mr. William S. Westerman, Attorney for Petitioner

Mr. Robert S. Brandt, Assistant Attorney General for the State.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[18]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 6TH DAY OF DECEMBER, 1968
MINUTE BOOK 66, PAGE 304

FRIDAY, DECEMBER 6, 1968

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

Technical Record, State Criminal Court

4662
OPINION

STATE OF TENNESSEE, EX REL,
WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

## OPINION

This petitioner has filed two previous petitions for habeas corpus since his imprisonment in the penitentiary but in neither of those two petitions did he see fit to raise the question included in this petition. The record discloses that he first obtained the idea of relying on the question of exclusion of Negroes from the jury from a newspaper article which showed that this question had been raised by another defendant and his lawyer in this county.

In this petition he raises the single question that there was a systematic exclusion of Negroes from grand and petit juries in Davidson County at the time he was convicted. The answer of respondent challenges the sufficiency of the petition, first on the ground that if there was such systematic exclusion it must be raised in a plea in abatement before trial and, secondly, it challenges the factual statements alleged in the petition.

This defendant was convicted on March 12, 1948 in this county of murder in the first degree and sentenced to serve ninety-nine (99) years in the penitentiary. He was at that time twenty (20) years of age. He entered a plea of guilty and

the petit jury was only sworn to assess the punishment. The question of his innocence was foreclosed by the guilty plea. He was represented by The Honorable Tom Ed. Murray, a reputable and learned member of the Nashville Bar, who was employed by the defendant's mother. He found no objection to his lawyer's conduct of his case.

While the legal question of waiver raised by the answer of the respondent could well be a valid one, the issue was not resolved on that question but an evidentiary hearing was had and the decision rests on the result of that hearing. The question is was there a systematic exclusion of Negroes from both grand and petit juries which violated his constitutional rights. This cannot be assumed but must be proven by the petitioner. The petitioner did not recall whether or not any Negro sat on the petit jury that assessed his punishment and, of course, he had no knowledge of the makeup of the grand jury that indicted him.

Certain census figures were made a part of the record but they are silent as to the number of eligible jurors by reason of age, either Negro or white. Petitioner Henderson called Judge Hart, a retired jurist of this county and the judge before whom the conviction was had, as a witness. We believe that the testimony of Judge Hart although it does show that relatively few Negroes served on the petit juries during the 1940's, that his testimony taken as a whole certainly negatives the idea of purposeful exclusion of members of the Negro race. The law under which this defendant was indicted and tried provided the same method of jury selection as is used currently in Davidson County and we have held there is no such exclusion resulting from the present system.

[20]

We conclude that there is absolutely no showing in the record before us that any segment of the community has been systematically or deliberately excluded by reason of race or color and we, therefore, conclude that there is no proof to establish the allegations of the petition and it must necessarily be dismissed.

This 6th day of December, 1968.

/s/ John L. Draper
John L. Draper, Judge

Filed Dec. 6, 1968
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 11TH DAY OF DECEMBER, 1968
MINUTE BOOK 66, PAGE 308

WEDNESDAY, DECEMBER 11, 1968

Court met pursuant to adjournment, presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662 MOTION

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

## MOTION

Comes the petitioner and moves the Court to allow petitioner to place into evidence and make of record in this cause the following facts which are of record in the Davidson County Criminal Court Clerk's Office:

1. That petitioner was indicted on February 12, 1948 (Min. Book 40 Page 282).

2. That the Grand Jury which indicted petitioner was selected and impaneled by Judge Gilbert (Min. Book 40, Page 89).

Petitioner will file duly certified copies of said records when they are made available.

/s/ W. S. Westermann
W. S. Westermann
Attorney for Petitioner

[Certificate of Service Omitted in Printing]

Filed: Dec. 11, 1968
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[22]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM, 18TH DAY OF DECEMBER, 1968
MINUTE BOOK 66, PAGE 335

WEDNESDAY, DECEMBER 18, 1968

Court met pursuant to adjournment, presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662 ORDER

STATE EX REL WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

## ORDER

The parties having consented hereto and it appearing satisfactory to the Court, it is hereby ORDERED that petitioner's motion filed on December 11, 1968, moving the Court to place into evidence and make of record in this cause the following stated facts which are of record in the Davidson County Criminal Court Clerk's Office be sustained and granted and that duly certified copies of said records of same be made a part of the record in this cause:

1. That petitioner was indicted on February 12, 1948 (Min. Book 40, Page 282), and

2. That the Grand Jury which indicted petitioner was selected and impaneled by Judge Gilbert (Min. Book 40, Page 89).

/s/ John L. Draper
JUDGE, DIVISION TWO

Approved For Entry:

/s/ W. S. Westermann
W. S. Westermann
Attorney for Petitioner

/s/ Robert Brandt
Robert Brandt
Asst. District Attorney General

Filed: Dec. 18, 1968
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

State Criminal Court, Motion for New Trial

[23]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM 6TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 348

MONDAY, JANUARY 6, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

| | |
|---|---|
| 4662 | STATE EX REL, WILLIE LEE HENDERSON |
| MOTION FOR NEW TRIAL | VS. |
| | C. MURRAY HENDERSON, WARDEN TENNESSEE STATE PENITENTIARY |

PETITION FOR WRIT OF HABEAS CORPUS

## MOTION FOR NEW TRIAL

Comes the petitioner and moves the Court for a new trial of this cause on the grounds that new evidence has been admitted by order of the Court on December 18, 1968.

/s/ W. S. Westermann
W. S. Westermann
Attorney for Petitioner

[Certificate of Service Omitted in Printing]

Filed Jan. 6, 1969
Earl Hawkins, Clerk
By: J. Shea, D. C.

Ordered that Court stand adjourned until Thursday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[24]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, SEPTEMBER TERM 10TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 354

FRIDAY, JANUARY 10, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
MOTION FOR NEW TRIAL OVERRULED

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON, PETITIONER

VS.

LAKE F. RUSSELL, WARDEN
TENNESSEE STATE PENITENTIARY,
RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS

Came the Attorney General who prosecutes for the State. Thereupon, this cause was heard by the Court upon motion

of the Defendant to be granted a new trial on the hearing of the petition for writ of habeas corpus which motion was by the Court overruled.

To the action of the Court in overruling petitioner's motion for a new trial, petitioner excepts and prays an appeal in the nature of a writ of error to the next Term of the Court of Criminal Appeals of Tennessee sitting in Nashville, which was by the Court granted and the petitioner is allowed thirty days from this within which time to prepare and file his Bill of Exceptions.

Mr. W. S. Westerman, Attorney for Petitioner.

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

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[25]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 13TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 357

MONDAY, JANUARY 13, 1969

CAPTION
JANUARY
TERM
1969
DIV.
TWO

Pleas at the Courthouse in the City of Nashville, County of Davidson, State of Tennessee, it being the January Term, 1969, the second Monday of January, 1969, and the 13th day of January thereof, and one hundred ninety third year of our American independence, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

Mr. Frank M. Bess, Jr., Mr. Charles R. Hill, Mr. Walter M. Parrish, Mr. H. L. Demonbreun, Mr. James Jones and Mr. N. L. Luther, Deputies Sheriff of Davidson County, Tennessee were appointed by the Court to wait upon the Court as court officers for the January Term, 1969, Division Two, Criminal Court.

Prayer was offered by Mr. Steve North of the Harding Place Church of Christ.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[26]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 14TH DAY OF JANUARY, 1969
MINUTE BOOK 66, PAGE 361

TUESDAY, JANUARY 14, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
PAUPER'S OATH

STATE EX REL, WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

A motion to appeal in forma pauperis was received by the Court in this cause and marked filed this date.

Mr. W. S. Westermann, Attorney for Petitioner.

(A copy of Pauper's Oath follows)

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[27]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY
TENNESSEE, DIVISION TWO

| | |
|---|---|
| STATE ex rel, WILLIE LEE HENDERSON<br>VS.<br>C. MURRAY HENDERSON, WARDEN, ETC. | NO. 4662 |

## PAUPER'S OATH

(Filed January 14, 1969)

I, Willie Lee Henderson, do solemnly swear that owing to my poverty, I am unable to bear the expense of the appeal which I am about to commence in this cause and that I am justly entitled to the relief sought, to the best of my belief.

/s/ Willie Lee Henderson
Willie Lee Henderson

Sworn to and subscribed before me this 27 day of Dec. 1968.

/s/ Jimmy H. Rose
Notary Public

My Commission Expires: 24 Jan. 1970

[28]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 7TH DAY OF FEBRUARY, 1969
MINUTE BOOK 66, PAGE 448

FRIDAY, FEBRUARY 7, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

| | |
|---|---|
| 4662 | STATE OF TENNESSEE, EX REL |
| BILL | WILLIE LEE HENDERSON |
| OF EXCEPTIONS | VS. |
| FILED | LAKE RUSSELL, WARDEN |
| | TENNESSEE STATE PENITENTIARY |

PET. WRIT OF HABEAS CORPUS

Came the Attorney General who prosecutes for the State and the Petitioner in person, who by his attorney tenders this his Bill of Exceptions to the judgment of the Court in dismissing the petition for writ of habeas corpus, which was by the Court signed, sealed, and ordered made a part of the record.

Mr. William S. Westermann, Attorney for Petitioner.

Mr. Robert S. Brandt, Assistant Attorney General for the State.

Ordered that Court stand adjourned until Monday morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[29]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 12TH DAY OF FEBRUARY, 1969
MINUTE BOOK 66, PAGE 467

WEDNESDAY, FEBRUARY 12, 1969

Court met pursuant to adjournment, present and presiding, the Honorable John L. Draper, Judge of Division Two of the Criminal Court of Davidson County, Tennessee when the following proceedings were had, to wit:

4662
MOTION TO BE RELIEVED AS COUNSEL FILED

STATE EX REL WILLIE LEE HENDERSON

VS.

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY

PETITION FOR WRIT OF HABEAS CORPUS

## MOTION

Comes now the Court appointed counsel for petitioner and moves the Court to allow his withdrawal as counsel on the grounds that his partner, the Honorable Robert H. Dedman, acts as Special Counsel for the State of Tennessee in habeas corpus matters in the Federal Courts, and therefore a conflict of interest on the part of said Court appointed counsel appears to exist.

/s/ W. S. Westermann,
Court Appointed Counsel
For Petitioner

I have today delivered a copy of this motion to the Honorable Robert Brandt, Assistant Attorney General.

/s/ W. S. Westermann

Filed: Feb. 12, 1969
Earl Hawkins, Clerk
By: J. Shea, D. C.

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[30]

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIV. II
MINUTES, JANUARY TERM, 12TH DAY OF FEBRUARY, 1969
MINUTE BOOK 66, PAGE 467

4662 STATE EX REL.,
ATTORNEY WILLIE LEE HENDERSON
RELIEVED
VS.
C. MURRAY HENDERSON, WARDEN

PETITION FOR WRIT OF HABEAS CORPUS

Thereupon, this cause was heard by the Court upon motion of Mr. William S. Westermann to be relieved as counsel for the petitioner which motion was by the Court granted.

Ordered that Court stand adjourned until tomorrow morning at nine o'clock.

/S/ JOHN L. DRAPER, JUDGE

[31]

## BILL OF COST

| | | |
|---|---|---|
| BILL OF COST | 32 pages at 60¢ per page | $19.20 |
| | Appeal | .75 |
| | Bill of Cost | .50 |
| | Certificate and Seal | .75 |
| | TOTAL | $21.20 |

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[32]

STATE OF TENNESSEE
COUNTY OF DAVIDSON

CERTIFICATE AND SEAL

I, Earl Hawkins, Criminal Court Clerk of Davidson County, State aforesaid, hereby certify that the foregoing is a true and perfect transcript of the record in the case of Willie Lee Henderson v. State of Tennessee on a Petition for Writ of Habeas Corpus, as the same appears of record at office in Nashville, Tennessee.

Witness my hand and seal of Court this 12 day of March, 1969.

/s/ Earl Hawkins
CRIMINAL COURT CLERK
DAVIDSON COUNTY, TENNESSEE

A. 80

State Criminal Court, Bill of Exceptions

# IN THE CRIMINAL COURTS OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE DIVISION TWO

(Filed February 7, 1969)

STATE OF TENNESSEE, EX REL
WILLIE LEE HENDERSON — PETITIONER

VS — NUMBER 4662

LAKE RUSSELL, WARDEN
TENNESSEE STATE PENITENTIARY — RESPONDENT

## PETITION FOR WRIT OF HABEAS CORPUS

For the Petitioner: Mr. William Westermann

For the Respondent: Mr. Robert S. Brandt
Asst. Dist. Attorney General

BEFORE THE HONORABLE JOHN L. DRAPER, JUDGE

## PETITIONER'S BILL OF EXCEPTIONS

[3] In the Criminal Courts of Nashville and Davidson County, Tennessee, before The Honorable John L. Draper, Judge, October 24, 1968, the following proceedings were had, to wit:

The Court: "I don't think it's necessary for you to read into the record the Petition, nor is it necessary for you, Mr. Brandt, to read the Amended Answer. That brings us down to the proof, gentlemen."

Mr. Westermann: "If Your Honor please, I would like to introduce this certified copy of the minute record from the Criminal Court Clerk's office, which is the minute record of Petitioner's conviction on March 12, 1948."

The Court: "I take it there will be no objection to that. Mark it filed, Mr. Clerk, as Exhibit Number One to the Petitioner's case."

WILLIE LEE HENDERSON, the petitioner, took the witness stand and testified as follows, after being first duly sworn:

DIRECT EXAMINATION

Questions by Mr. Westermann:

Q Would you state your name, please?

A Willie Lee Henderson.

[4] Q And your present age?

A Forty-one.

Q What is your race?

A Colored.

Q Do you recall the date of your conviction?

A Yes, sir.

Q And that was March 12, 1948?

A March 12. Yes, sir.

Q Have you been confined in the state penitentiary in

Nashville since that time?

A I have.

Q What was your age, Mr. Henderson, at the time of your trial?

A I was twenty years old.

Q What was the name of the lawyer who represented you at that time?

A Mr. Tom Ed Murray.

Q Was he employed by you, or appointed to represent you by The Court?

A He was employed by my mother.

Q What was your educational background at the time, Mr. Henderson?

A I was stopped in the sixth grade.

[5] Q How old were you at the time you quit school?

A I quit school at fifteen.

Q Were you ever gainfully employed?

A Yes, sir, I worked at a brick yard. Bush's brick yard.

Q What year did you work at Bush's brick yard.

A When I was around about sixteen or seventeen.

Q Did you work there up until the time you were convicted of this crime?

A No, sir.

Q What did you do after you left Bush's brick yard?

A I worked around a funeral home, after I left Bush's brick yard.

Q Did you reside with your mother at that time? Did you live with your mother?

A Yes, sir.

Q Where was your father?

A My father was dead.

Q Who else was in the family?

A Aunties and half sisters.

Q They all lived in the same house?

A Yes, sir.

Q Who lived in the house with you and your mother?

A Nobody but me and my mother and stepfather.

[6] Q Who is your stepfather?

A That's Ephram Hall.

Q What's his occupation? Where did he work?

A He worked at the brick yard.

Q Do you know in what capacity?

A Yes, sir.

Q What was his job?

A He made bricks.

Q Immediately prior to and at the time of your trial and your conviction, were you informed by Mr. Tom Ed Murray concerning your rights as they related to the constitution of grand and petit jurors?

A No, sir.

Q He didn't tell you anything about it?

A No, sir.

Q Did you have any independent knowledge of the means of selection, and your rights relative to grand and petit jurors?

A No, sir.

Q Did your lawyer ever ask you whether or not you wished to challenge the constitution of the grand jury on the basis that Negroes were excluded from it?

A No, sir.

[7] Q Did he ever advise you that anything you did or did not do would effect your right to raise this issue? Did he ever talk to you about this at all?

A No, sir.

Q I think you stated you had no knowledge of this yourself?

A That's right.

Q Did you have any knowledge that Negroes did not serve on the grand juries or petit juries of Davidson County?

A No, sir.

Q At the time you were convicted?

A No, sir.

Q And your lawyer never mentioned anything to you about this right to properly constitute the grand or petit juries?'

A No, sir.

Q How old are you now, Mr. Henderson?

A Forty-one.

THE COURT: "Did you go to trial on a plea of guilty, or not guilty?"

A I didn't plead guilty at all.

THE COURT: "You plead not guilty, then?"

A Yes, sir.

THE COURT: "And the jury convicted you on [8] a plea of not guilty?"

MR. WESTERMANN: "Your Honor, I am not sure that is true. I think the record shows that he did plead guilty. Does the record indicate that he plead guilty?"

THE COURT: "Why did you tell me that you did not plead guilty, when the record shows that you did plead guilty?"

A My lawyer entered that.

THE COURT: "You know whether you went to trial on a plea of guilty, or not, don't you?"

A I didn't plead guilty. He pleaded me, and entered the plea then.

THE COURT: "What you are saying, then, is that your lawyer entered your plea of guilty for you?"

A Must have.

THE COURT: "Don't say 'must have.' Is that what you are saying?"

A Yes, sir, I am saying Mr. Tom Ed Murray.

THE COURT: "I understand who it was, but did your lawyer enter your plea of guilty for you?"

A Yes, sir.

THE COURT: "But he did it with your consent?"

A No, sir.

[9] THE COURT: "Mr. Westermann, my only purpose in asking those questions is touching his credibility here. If he doesn't know anything, I wonder what faith I can give to what he says."

(Mr. Westermann continuing)

Q Were there any Negroes on the jury which convicted you?

A No, sir.

CROSS-EXAMINATION

Questions by Mr. Brandt:

Q Mr. Henderson, you plead guilty, is that right?

A Sir?

Q You plead guilty?

A Plead guilty.

Q Was it in this courtroom here?

A I was tried in Division One.

Q Did you sit down at the table and stand up and say you plead guilty?

A No, sir.

Q Did your lawyer say you plead guilty?

A My lawyer, Mr. Tom Ed Murray, all I know that happened, I was in a little room and came out and they said he is guilty of first degree murder. That's all I know, and they gave me ninety-nine years. That's all I know, and I didn't plead guilty. I didn't plead at all.

[10] Q Did you file a previous Writ of Habeas Corpus on this question?

A I have had a habeas corpus on it.

Q Has that been granted for the fact that you were inadequately represented, or tricked into going to the penitentiary?

A Well, they denied it.

Q Who were you charged with killing in this case we are talking about now?

A Mr. William H. Cotton.

Q What is his relationship to you?

MR. WESTERMANN: "Your Honor, I am going to object to this type of questioning."

A He wasn't any relationship to me.

Q Stranger?

MR. WESTERMANN: "I don't think this has any relevancy to the issues in this proceeding."

MR. BRANDT: "I was trying to find out a little something about the case."

THE COURT: "Well, I don't believe that would help."

Q What sentence did you get?

A Ninety-nine years.

[11] Q Do you know of your own knowledge whether there were any Negroes on the grand jury which indicted you?

A Do I know?

Q Yes, sir.

A As far as I know, there wasn't any. In fact, I check and I found out there wasn't any.

Q As far as you know, there were not?

A Yes, sir.

Q As far as you know, there could have been, too?

A Well, according to the list I got, there wasn't any.

Q According to the list you got?

A According to the people that told me about it, there wasn't any.

Q Did people out at the penitentiary talk to you about it?

A People that came out there talked to me about it.

Q Who was that?

MR. WESTERMANN: "If Your Honor please, I object to this."

THE COURT: "Gentlemen, I want to know. He has filed two petitions here before, and he has never raised this question, and The Court is interested to know how he got this information, that now he files a petition. I think it is proper for him to ask him that."

[12] Q Aside from your lawyer, who are you telling The Court has told you that there were no Negroes on the grand jury?

A I got it from a list in the paper once, in a case that was out here in court, and I had a lawyer check on it.

Q Which lawyer?

A Mr. Barrett. He was on my other petition in federal court, and he raised the issue, and another one told me that he would put it in my petition for me, later on, then, I filed this other petition myself, in prison.

THE COURT: "Now are you saying that this question has been raised in a petition to the federal court, and your lawyer put it in?"

A No, sir. I said I had a petition in federal court, and the lawyer I had in federal court told me about the issues of systematic exclusion.

THE COURT: "Did you put it in your petition?"

A I put it in that petition this time.

THE COURT: "I am talking about the petition you had in federal court?"

A No, I didn't have it in there.

THE COURT: "Why didn't you put that in there?"

A Because the petition came through the first circuit

[13] court, and they denied it to the court, and it never was put in there.

THE COURT: "I am talking about the case now filed in the federal court. Not filed in the circuit court. In the federal court."

A The same case was in the federal court and in the circuit court. It went to the federal court, and they denied it in the State Supreme Court, and I appealed it to the District Court, and the Sixth Circuit Court of Appeals.

THE COURT: "Oh, then you appealed that case?"

A On my petition.

Q The question of systematic exclusion of Negroes from grand and petit juries was not raised before? Is that right?

A It was not raised in my other petition?

THE COURT: "In your other two petitions?"

A That's right.

Q You are saying that the reason you know there were no Negroes on the grand jury which indicted you is because you read it in the newspaper?

A Well, they had a case in the newspaper, that was before I filed this petition, and I got it from there, and I started getting the laws, and different things, to put in my petition and filed it.

Q Have you been going to school at the penitentiary

[14] A No, sir, I haven't.

Q The sixth grade is as far as you have gone?

A That's right.

Q In your research, did you come across the case called Strouder versus West Virginia?

A I don't recall it.

MR. WESTERMANN: "If Your Honor please, I can't understand the relevance of this kind of questioning to the issues presented of systematic exclusion of Negroes from

the grand jury, or how it is related at all to the outcome."

MR. BRANDT: "If Your Honor please, I am trying to determine when he found all of this out."

MR. WESTERMANN: "What relevance does that have, Your Honor?"

THE COURT: "I think that is relevant. I am interested in that inquiry."

Q Did you come across that case? Does the name mean anything to you?

A I don't recall it. I come across many of them, and I don't remember that one.

Q Mr. Henderson, you testified in the jury box
[15] what members of the jury sat in your case. There were no Negroes at all?

A On the petit jury?

Q Right.

A I had an indictment. The indictment showed that.

Q The indictment showed there were no Negroes on the petit jury?

A The minutes of the pages in the court. I checked that. I had my mother to check that.

Q Do the minutes of the court have people listed as white and colored?

A Sir?

Q Do the minutes of the court have that on their list, like opposite a man's name, do they have black man or white man?

A No, but they had all the names on there, and she checked the names.

Q Your mother checked all the names on there, and found out they were all white people?

A Yes, sir. She had all of that checked.

THE COURT: "Did you have the same lawyer in both of your other two petitions for writs of habeas corpus?"

[16] A No, sir.

THE COURT: "What was the name of your lawyer in your first two petitions?"

A The first one was denied.

THE COURT: "I know, but what was your lawyer's name?"

A My lawyer was Mr. Ellis, the first lawyer I had.

THE COURT: "Mr. who?"

A Ellis. Mr. Leroy Ellis, and when I went to federal court, it was a lawyer named Mr. Bass, or something like that. They appointed him in federal court.

THE COURT: "But you filed a second petition in the circuit court."

A Yes, sir.

THE COURT: "Who represented you in that one?

A In the second petition I filed, the first petition I filed was denied. I didn't have no counsel. The second petition was Mr. Leroy Ellis."

THE COURT: "In the first petition, no lawyer?"

A That's right. In the second petition it was Mr. Leroy Ellis, and I appealed it to the federal court and they appointed me another counsel."

Q Did you know, Mr. Henderson, that your
[17] lawyer, Mr. Lee Ellis, was a leader in the American Civil Liberties Union?

MR. WESTERMANN: "Your Honor, I again object that this line of questioning has no relation to the issues in this case."

MR. BRANDT: "If Your Honor please, I am trying to show the seriousness of this case. I think it can be shown that this man had at one time a lawyer who Your Honor knows is a champion in these causes, and that lawyer didn't even see fit to raise this question."

MR. WESTERMANN: "How is that relevant?"

THE COURT: "I am going to let him answer that, Mr. Westermann."

MR. WESTERMANN: "Please note an exception."
(Mr. Brandt continuing)

Q Did you know that Mr. Ellis was active in American Civil Liberties Union?

A After that, I did.. After they appointed him to represent me.

Q Did you know that the American Civil Liberties Union is pursuing another case out of this court right here involving the same question?

A No, sir, I didn't know that.

Q Were you charged with killing a white man,
[18] or a black man?

A I was charged with killing a white man.

MR. WESTERMANN: "I object to that, Your Honor. It is not the question of whether he really killed anybody, but the question that it was worded that way."

MR. BRANDT: "If Your Honor please, this man is not innocent until proven guilty. He is guilty at this stage of the proceedings."

THE COURT: "Oh, yes, there isn't any question about that."

MR. WESTERMANN: "That has no relevance in this hearing."

MR. BRANDT: "I am trying to establish if there was some prejudice involved here. I don't like to see a man convicted on account of racial prejudice any more than anyone else does. It goes against my entire moral fiber."

THE COURT: "I think it is competent. The whole contention is racial prejudice, and that's all it is."

MR. WESTERMANN: "That's true, it is a question of systematic exclusion of Negroes from juries which eventually gets down to prejudice, but how did this petitioner have knowledge of prejudice back in 1948? I don't see that his knowledge of it or lack of knowledge of it is relevant."

[19] THE COURT: "I will have to determine that when I get the facts."

(Mr. Brandt continuing)

Q Do you think that you were prejudiced by not having Negroes sit in the jury box?

MR. WESTERMANN: "I object to that, too, and I object to this whole line of questioning, and please note my exceptions."

THE COURT: "Your exceptions are noted." (To the witness) "What is your answer?"

A Well, at this time, I will say that I was. At that time, I didn't know, because I didn't know anything about that. At that time, I was in court, and I didn't know anything about it.

MR. WESTERMANN: "If Your Honor please, I would like to note an objection to this matter on another ground. It gets to the issue of whether or not he feels that he was done some wrong by the action of that grand and petit jury, and that's not in issue, either."

THE COURT: "I am not so sure about that, now, Mr. Westermann."

MR. WESTERMANN: "When it gets to the question of whether or not he was innocent or guilty of that act,

[20] that testimony is not competent."

THE COURT: "There is no question about his guilt or innocence. He is asking him now if he thinks, and I think it is competent, whether or not at that time he was in any way prejudiced by the fact that there were no Negroes that sat on that jury."

MR. WESTERMANN: "Is Your Honor overruling my objection?"

THE COURT: "Yes, sir. I think we are now down to the heart of it."

(Mr. Brandt continuing)

Q Mr. Henderson, I just want your truthful answer.

You will not offend me or anybody else by it.

A Well, it's like I said. I said at that time, I didn't know, but now, since I have found out these things, I feel that I was.

Q Looking back on it, you think you were?

A Yes, sir.

Q And if it developed that there were no Negroes on the grand jury, you would think the same thing about that, looking back on it, you think that hurt you, too?

A Yes.

Q Of course, if there were Negroes on the
[21] petit jury, you would know that, because they sat right here in the box?

A At that time, I didn't know anything about it.

Q But I mean you could tell by looking at them whether they were white men or black men, couldn't you? Is that right?

A Yes, that's right.

Q But as far as the grand jury is concerned, you never saw anybody on that grand jury, and couldn't identify them or testify who they were, could you?

A No, I couldn't.

Q The lawyer who represented you was paid by your mother. Is that right?

A Yes, sir. That's right. Hired by my mother.

Q Did you ever talk with your mother about the fact that you were not satisfied with your lawyer, or were not satisfied with the representation he was giving you?

MR. WESTERMANN: "I object to that, Your Honor. I would like to limit the state to the issue of systematic exclusion of Negroes from the jury, the grand jury and the petit jury, and the answer to that question has no relevance whatsoever."

MR. BRANDT: "That question has relevance, if Your

[22] Honor please."

THE COURT: (Interposing) "I would like to know that. I think it is proper for him to make that inquiry."

MR. WESTERMANN: "Are you talking about the time he was convicted, or what time?"

THE COURT: "The day of the conviction."

MR. WESTERMANN: "I still object to that line of questioning."

THE COURT: "Well, I am going to overrule it."

MR. WESTERMANN: "Please note my exceptions."

(Mr. Brandt continuing)

Q Did you express to your mother your desire to have a lawyer other then Mr. Murray?

A No, I never did express to her.

Q In other words, you were satisfied with the representation Mr. Murray gave you?

A Well, my mother hired him. All I know, he was supposed to have been representing me, and as far as knowing anything about the law, at that time I didn't know anything about the law.

THE COURT: "He is not asking you about the law. He is asking you about one thing. Were you satisfied with the representation Mr. Murray gave you, or were you dissatisfied with it?"

[23] A I had to be satisfied, it was my mother that hired him.

THE COURT: "No, sir, you didn't have to be satisfied. We are trying to determine that. Were you satisfied, or were you dissatisfied?"

A It's all I could be, was satisfied.

THE COURT: "All right. Can it be said that you raised no objection to your mother about it? Is that right?"

A That's right.

At this time, the petitioner withdrew from the witness stand.

MR. WESTERMANN: "If Your Honor please, at this time I would like to introduce the affidavit of Mr. Tom Ed Murray, who represented the petitioner."

THE COURT: "All right. You may read it."

At this time, the affidavit was read by Mr. Westermann as follows:

IN THE CRIMINAL COURT OF DAVIDSON COUNTY, TENNESSEE, DIVISION TWO

STATE OF TENNESSEE, ex rel
WILLIE LEE HENDERSON
Petitioner

vs. No. 4662

C. MURRAY HENDERSON, WARDEN
TENNESSEE STATE PENITENTIARY
NASHVILLE, TENNESSEE
Respondent

[24]

AFFIDAVIT

Tom Ed Murray, who after being duly sworn according to law, deposes and says that:

1.

I represented petitioner herein when he pleaded guilty to the crime of first degree murder which plea resulted in a conviction and sentence now being served. I had been employed by petitioner's now deceased mother.

11.

I had no knowledge at the time the plea of guilty was entered, nor have I any present knowledge, that members of petitioner's race had been systematically excluded from service on the Davidson County Grand Jury, either from

the grand jury which indicted petitioner or from grand juries prior to that grand jury.

III.

I had no knowledge at the time the plea of guilty was entered, nor have I any present knowledge, that members of petitioner's race had been systematically excluded from service on Davidson County petit juries, either from the panel from which the jury which sentenced petitioner was selected or any earlier panels.

[25] IV.

I have never been aware of any irregularity in the method of selection of grand or petit juries, particularly in regard to systematic exclusion of members of any race, so there was never occasion to advise the petitioner of any rights that he may have had in the composition or method of selection of the membership of grand and petit juries, nor did I advise petitioner that any action by me for failure to act would waive or affect his right in regard to the composition or method of selection of grand or petit juries.

V.

I am not now aware and was not aware at the time of petitioner's trial that petitioner had knowledge of any of the matters referred to in the previous parts of this affidavit.

If petitioner had any knowledge of any irregularities in the composition or method of selection of grand or petit juries, either at the time of trial or subsequent thereto, he never made this knowledge available to me.

Further deponent saith not.

(s. Tom Ed Murray)
Deponent

[26] STATE OF TENNESSEE
COUNTY OF DAVIDSON

Subscribed and sworn to before me this the 23rd day of February, 1968.

(s. Mary L. Brackman)
Notary Public

My commission expires 8-17-68

THE COURT: "Let it be marked filed, and it will become a part of the record."

MR. WESTERMANN: "Your Honor, I would like to bring to The Court's attention, although you are probably aware of the fact, that the grand jury selection in 1948 was controlled by Tennessee Private Acts of 1947, Chapter 53, and also petit jury selection was controlled by that. I would like for that to be made a part of the record, and also the qualifications required for jury service, which is controlled by TCA 22, Section 101. It requires that they be citizens of the United States and residents of Tennessee, and in the county for twelve months prior to service."

THE COURT: "I think you are exactly right about those things."

MR. WESTERMANN: "And at this time, I would [27] like to introduce information from the Board of Census in Washington relating to the population of Davidson County, the Negro population of the county for 1940 and 1950, and the population of the persons twenty-one years and older for 1940 and 1950, with information relative to how many were white and how many were not white, and the total population. This is certified by the Director of the Census."

THE COURT: "All right, sir."

MR. WESTERMANN: "The total population in 1940 and 1950 for Davidson County, Tennessee, 1940 was 257,267. The total white population for that year was 200,454. The total non-white population was 56,813. In 1950 the total population was 321,758, of which the white population was 257,289, and the non-white was 64,465. The population twenty-one years and over for 1940 and 1950, the total population was 168,337, of which 129,868 were white and 38,469 were Negro. In 1950 the total population twenty-one years old and over was 211,930, of which the white population was 168,706, non-white 43,224."

THE COURT: "Mark it filed, Mr. Clerk, and let it become a part of the record."

At this time, Judge Chester K. Hart was called by the petitioner, took the witness stand, and his oath
[28] being waived, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Westermann:

Q Would you state your name, please, sir?

A Chester K. Hart.

Q And your age?

A Eighty-five.

Q And your address, sir?

A 2509 Oakland Avenue.

Q Would you state to The Court information concerning your years of service as Criminal Court Judge of one of the criminal courts of Davidson County? In what year did you begin service?

A In 1922.

Q When did you retire?

A In 1958.

Q Was there another Davidson County Criminal Court at that time, sir?

A Yes. When I went on the bench, there were two criminal courts.

Q Who was judge of the other criminal court?

A Judge M. DeBow.

[29] Q This was in 1922?

A Yes. Now, the court was created in 1920. Judge Gerrard was appointed. I ran against him, and he was on the bench for two years, and I went on. There was just one criminal court up to that time, and from then on, two, up until right recently.

Q Who was the judge of the other court from the years 1943 through 1953?

A Judge Gilbert was on for twenty-six years, I believe. Judge Blackart was on——

Q I understand Judge Gilbert retired in 1958. Is that correct?

A Yes.

Q And he was judge prior to 1943?

A I think so. I believe he was, twenty-six years, I believe.

Q Judge Hart, would you tell The Court, please, the method of selection of grand jurors which you employed after 1947?

A After 1947, the legislature changed the law, and the judges were not limited to the list furnished by the jury commission and the judges could select whomever they thought would make good grand jurors, and we were not in any way, as I recall, limited in our judgment on the matter. We could use our best judgment. That's the way I recollect it.

Q Would you state to The Court, please, the

[30] method of selection which you employed during the

years from 1947 until 1953? The grand jury.

A The way I did, from 1947, I started out when it was the responsibility of wholly mine, and I was acquainted with people all over the county, and I tried to select people that I thought would give everybody a fair hearing and people that felt the responsibility of doing things right, and I selected men that way, that I thought were best. Sometimes, when I would get the jury list, if I found people on there that I thought would make good grand jurors, I selected some from there. I used my own judgment as to what I thought would be the best panel of jurors that I could get. I did do this. I tried to get on various occupations, and things of that kind, so there would be a general knowledge in the jury of most anything that might come up. The court, of course, couldn't do much toward saying what the grand jury did. We had no control over them, and they could do whatever they thought was proper, so far as whether they indicted or not. We tried to get men we thought would be fair to everybody.

Q Is it a correct statement that you generally selected those persons whom you knew?

[31] A Well, I knew them, or knew of them. I wouldn't say that I knew everybody on the grand jury before I put them on, but I had information about them, what kind of people they were, before they went on the grand jury. I didn't select anybody at random for the grand jury.

Q And this was the method of selection that you employed from 1947 up through 1953?

A 1958.

Q Until 1958?

A Yes.

Q Do you recall ever selecting a Negro to serve? Let me ask you this. Was there only one grand jury in

Davidson County at any one time?

A There was only one grand jury at any time in Davidson County.

Q How was the responsibility for selecting the grand jury divided up among the two criminal court judges?

A For some time, and I don't know just how long it was, the two judges selected them. One would select part of them and the other would select part of them. They rotated in the selection of the foreman of the grand jury, and at that time they were taken altogether off of the jury list, as I remember.

Q This was probably 1947, then?

[32] A Yes. From the time I started in down at the old court house, for a while, and I don't know when they changed it from the time when the judge selected the foreman, they changed it so he selected the whole grand jury. I don't know what date that was.

THE COURT: "The Acts of 1947 make it the duty of Division One and Division Two to alternate in the selection of the grand jury."

A Before that time, each one selected some off of the list.

Q So after 1943, you selected half of the grand jury and Judge Gilbert selected half?

A No, after 1947 he would have one term, and we alternated.

Q Given a particular grand jury, one judge selected all the members of that particular jury?

A In alternate terms, yes.

Q One grand jury was selected wholly by one judge, and the next grand jury would be selected wholly by the other judge?

A Yes.

Q And this practice was instituted in 1947?

A In 1947.

Q Do you recall having selected a Negro to serve on any of the grand juries?

[33] A No, I don't think I did. I will make an explanation of that. It wasn't a question of whether he was black or white. As I said a while ago, I selected grand juries that I thought would give everybody a fair deal all the way through and a grand jury that if I was charged, I would have wanted to pass on mine. I felt when they put that obligation on me, saying it was up to me to select the grand jury, that I had the obligation of selecting one that would be fair to everybody, and that's what I tried to do. If I remember correctly, I don't think I put any Negroes on the grand jury, because you asked me a question a while ago, did I know everybody on the juries. I grant you, I didn't know everybody on the grand jury before putting them on, but I knew their reputation and the kind of people they were, and I selected—well, I was after the good people for the grand jury, and I didn't put anything on there but the best.

Q To the best of your knowledge, who was the first Negro grand juror selected in Davidson County after 1940?

A The first I remember was H. H. Walker.

Q I say after 1940. Do you recall any serving on the grand jury prior to 1940?

A No. I can explain that to you to some extent.

[34] Not about on the grand jury, but for a long time when colored people were——

Q (Interposing) Excuse me a moment, but I am getting to the petit jury in a moment.

A I was getting back to that myself. The judges had nothing to do with who was on the list. The jury commission had their responsibility to select people, and they made out the jury list. It was, at one time, at first the jury list,

after being gotten out, that was for the same jury commission selected the circuit court jurors as well as the jurors that were to be used in the criminal court. The court officers, at that time, were given the lists. They had six court officers, and they were put in different localities. One would have one section and another would have another, that way, and they then returned to the court the list to show those that had been found, or had not been found, or who were dead, or had moved, and things of that kind, and then the list would be turned over to us, and as I understood my duty at that time in the selection of jurors, was to try to select jurors from every section of the county and from no particular industry, or things of that kind. Then we took the list and looked them over, or I did. I don't know whether Judge Gilbert did, or not. But if I found
[35] on that list anybody that I knew was not fit for jury service, and if I knew that if he was summoned to come in that I wouldn't let him serve, I struck his name off the list.

Q What criteria did you use to make that conclusion, that they were unfit?

A Well, mostly criminal, and the reputation that they had. Probably I didn't know what some of them were, but if they had a reputation of being bootleggers, or working in the numbers game, or gamblers, or things of that kind, I struck them off, because I wouldn't let them serve if they came in. One reason for that, as I understood it, when the list had been made out, before it became permanent, it was supposed to be turned over to the judges to do the very thing that I did at that time, that I didn't have the opportunity to do before, because the jury lists were made out such a short time before they had to draw the jury that they didn't turn it over to the judges on some occasions for that, and so when they were summoned I took them

off, and I didn't summon them again.

Q Do you remember the year when Dr. H. H. Walker first served?

A No, I don't.

[36] Q Can you remember within three or four years? Can you say approximately what year it was?

A No, I don't know. I would have to guess, and my guess wouldn't be any good.

Q Do you think it was after 1947?

A Yes, I know it was after 1947. I am pretty certain of that.

Q Dr. H. H. Walker is a Negro, and he is the first Negro you recall serving?

A I believe I am right about it, but you can look up the records and get the absolute facts.

Q You covered a question in answering a previous question. The method of the selection of petit jurors which you employed, and without repeating that, I would like to try to get the point in. When you finally got a group of people from which you selected a panel of actual jurors to be selected, how many people would it take to get the panel?

A I told you twenty-four, I thought, but it was twenty-one.

Q So you eventually select a group of twenty-one people?

A Oh, yes. Along at the last there, we had jurors for three weeks. First, we selected for a whole term. We would send the list out to the officers, and we would then select four panels of twenty-one, each one of

[37] us.

Q You selected four panels, and this would cover the whole term?

A Yes, we would select four panels, some for the three weeks, and then another, and then another.

Q This was for the whole term?

A Yes. That would take up the whole criminal court. The jurors, after being brought in court, served in both divisions. They were not limited to this court, or over there.

Q Back in 1922, in the beginning of your service as criminal judge, were any Negroes on any of the four groups?

A There wasn't any four groups back there. Just one.

Q Out of the groups from which you did select the twenty-one.

A I don't know.

Q When did you start selecting four groups of twenty-one?

A When the jury was limited to three weeks. At one time, you would select them for the whole term.

Q Do you remember when this change took place?

A No. The law changed it. We didn't.

Q Presuming it was changed in 1947, back in 1922 and up until 1947, were Negroes present among these panels from which the actual trial jurors were selected?

[38] A Negroes were on the lists, if that's what you mean.

Q How did you know that?

A Well, I think, if I remember correctly, back earlier they were marked colored. I believe they were. I am not certain. I think at one time, the jurors were marked as colored or white. There was no harm to that, but it was "John Jones, colored," or "John Jones, C." That's the way I remember it. Back in those early days, I don't remember whether they were on the jury list or not. I had nothing to do, at that time, with the selection of the jury. They were already selected, as far as I remember, and that went on for a number of years.

Q Do you recall seeing Negroes in these groups of

twenty-one from which the actual trial jurors were selected?

A They came in. A lot of them wanted off, and some of them would serve.

Q Back in 1922?

A Oh, no.

Q I am talking about 1922 until approximately 1947.

A That's what I had in mind. That's what I was trying to tell. We didn't have four juries.

Q I am talking about the panels selected from 1922 until 1947. Were Negroes represented?

[39] A Yes. There were Negroes on them.

Q In 1922?

A No, I don't remember that. My opinion is there weren't any. I don't know.

Q What about 1947?

A There were Negroes on there before 1947.

Q In the panels from which the jurors were selected?

A Yes.

Q The actual jury trial jurors?

A Yes.

Q Do you remember how many?

A Are you talking about that were selected, or that were on the——

Q That were actually on the panel. I am talking about the actual panels from which the twelve people were selected to try cases. Were there Negroes in that group, prior to 1947?

A I don't know when the Negroes started to serve. For a long time, you couldn't get one to serve, and if an officer tried to serve a subpoena on them, they were all afraid he was trying to arrest them, or something, and they would say they didn't live there. I was told that by the officers when they would go out to get a witness, particularly, or something of the kind, the people wouldn't

[40] tell them. They would ask, "Does John Jones live here?" They would say, "No, sir, I don't know him," and they couldn't get any information. We had no control of that.

Q From the panels from which the active twelve were selected, were there Negroes on those panels?

A Yes. We selected them. Yes.

Q Prior to 1947?

A No, I don't remember when they first began to be put on. I don't know whether they were in the jury box or not.

Q Do you recall whether it was about the time that H. H. Walker first served as grand juror?

A I am of the opinion it was some time before that.

Q Do you recall when Negroes started to appear on the jury panel from which the actual twelve were selected?

A Well, no.

Q Can you recall the actual number of Negroes that you saw on one of those panels?

A No, I didn't try to count that.

Q Do you think it was more than four?

A Do you mean on the panel that was furnished me?

Q From the panel that was furnished you from which twelve people would be selected to try a case.

[41] A The five hundred?

Q No, I am not talking about the five hundred, Judge Hart. I am talking about the actual group of people from which twelve were selected to try a particular case. There were a group of jurors, and from that group an actual trial jury of twelve would be selected to try a case. This is the group I am talking about. I have been calling that the jury panel, I don't know whether accurately so, but I am talking about the actual jury of twelve that would be selected to try a case. In that final group from which

the twelve were selected, were Negroes present?

A Yes. Let me explain this to you. Judge Gilbert, after selecting the twenty-one jurors for the term, had what he called jury number one. When he opened court they would bring in jury number one. In my division, I would tell the officer, "Get me a jury." I didn't know who was coming or who didn't come. There were colored people on the jury, usually. Not too many of them, because sometimes in selecting these four we would have colored people on the second, third, or fourth jury and they never did come back.

Q How many Negroes were on these panels? Let's start in 1958.

A You know the question of whether they were white or colored didn't impress me one way or the other
[42] until the proposition started here about the Negroes weren't being treated fairly.

Q I did not mean to imply that at all.

A That's the first time that I paid any attention to whether they were white or black in the selection of them.

Q What I am trying to get to, though, is do you have a recollection of the maximum number of jurors which served on a panel from which the actual twelve were selected.

A Well, the panel was twenty-one.

Q Were Negroes on the panel of twenty-one?

A Yes, they were on those panels.

Q What is the most number of Negroes you ever saw on a panel of twenty-one?

A In my court, two or three.

Q Were there panels of twenty-one where there were no Negroes?

A Yes.

Q Were there more instances of no Negroes on the panel of twenty-one than there were of some Negroes on

the panel of twenty-one?

A I think so. Back early in my time on the court, there were very, very few Negroes, if any. I don't know. At that time, there wasn't any question raised about white or black or anything of the kind, and I don't remember.

Q Starting back in 1922, were there very few,

[43] if any?

A Yes. Few, if any.

Q And then in 1958, at about the time you retired, were there any then?

A Yes, it picked up after the question of Negroes being on the jury—I think the jury commission, you know they laid out new panels, new boxes, and I think they put them in more. We had a trial here in court, in Judge Gilbert's court, and I sat here with him, and the jury commission was called in. They wanted to see the jury box. They wanted to open it and look at it. Well, we wouldn't let them do that, because it's against the law for anybody to do that, but we told them they could summon in any of the jury commission to testify, and they summoned them and they testified that there were many Negroes in the box. A lot of these things you asked me before, I have been thinking about it all together, and that's exactly correct. I didn't know how many were on the panel myself. I asked Miss Alma and she said it was twenty-one. I thought it was twenty-four.

Q So on the panels of twenty-one as late as 1958, there were never more than three Negroes?

A That's just my recollection of it. There were more than that supposed to be on there that didn't come back. After they were put on the jury, they didn't come

[44] back, and we had to fill them out with other people.

Q And you say there were panels of twenty-one which were all white?

A Yes.

Q Did the panels of twenty-one which were all white outnumber the panels with Negroes?

A I think so.

Q Is it an accurate statement that eighty percent of the panels of twenty-one that were selected were all white?

A I don't know about this percentage proposition. I wouldn't say eighty or ninety or what, but of course the great majority were white. The jury commission was supposed to select them from different all sections of the county, and different districts according to the number of people that lived in them, and things of that kind, and of course that made it work out that way, because there were many districts of the county where there were few Negroes, if any, and so necessarily the jury box included more white than it did colored. I have been thinking about this thing since you talked to me about it, and I am trying to make it as positive as I can.

Q To the best of your recollection, what per-
[45] centage of these panels were all white? Eighty percent? Ninety? Seventy-five?

A Well, for a long time, as I told you, there were no Negroes.

Q I am talking about from 1945 to 1958, to be reasonably accurate.

A I wouldn't want to make a guess on the percentage of them. I had rather tell you the facts as I remember them. I wouldn't want to make guesses.

Q As a matter of fact, were the vast majority of the panels of twenty-one all white?

A Some of them were, yes. You see, we would try to select them from all over the county.

Q How often, Judge Hart, were the names in the jury boxes from which these lists were made changed?

A Well, there was no time for it, and that was fixed by statute for them to do it. We would have a box with the jurors in it that would last for many years, sometimes, and then another thing about that would be when the same ones were in there, and we had to exclude the same ones that had served in three years—I think it's two years after 1947, isn't it, Judge?

THE COURT: "It is still three."

Q Do you mean the names in the box were
[46] changed every three years, or were they not allowed to serve again under three years?

A They couldn't serve only one time in the three years. That meant that we would send a ticket to the jury commission of those that had been selected, and they were then supposed to put them in the box after three years.

Q How often were the names changed in the first box?

A Well——

Q The box in which all the names were listed.

A Well, some of them were put back anyway. We had to strike a lot of them that had been on, and the commission made a mistake in putting some of them back, but the law was that they were not to serve but once in three years, and when they would come in, we would ask them how long it had been since they had been on the jury and if they had served on a jury within three years, we would excuse them.

Q What I am trying to get at is how often new names were put in the jury box?

A If I remember correctly, there was no particular time for it. When the panel—when the jury box got down to where it was hard for the court to get a jury of jurors, then we, and Judge Lankford was chairman of the board of
judges, and we would have meetings and they would
[47] ask the jury commission to fill up the box. I don't

know how often that was.

THE COURT: "That's still the way it is done. You have stated it right. When the jury box gets so low that we can't get people who haven't served in the last three years, then we ask the jury commission to replenish the box. There used to be ten thousand, now it's twenty thousand."

Q What I want to know is how often the new names were put in.

A That depended on whether or not the lists were——

Q Was it twenty-five years, two or three years?

A It was several years, I think, before we changed. Just when the jury box got low and we would have a hard time getting jurors and we asked the jury commission to make us out a new one.

Q Was it more than two years?

A Oh, yes.

Q Was it more than five years?

A I guess sometimes.

Q I wondered if you had knowledge of it.

A I had knowledge of it at the time. When we needed it, we would ask the jury commission to get us another.

Q Was it more than four years?

[48] A I think it was, and during the meantime, a whole lot of them would be used.

Q Of the actual juries of twelve which tried cases, do you recall during your term of service whether there were Negroes on those juries?

A Yes, there were Negroes on the juries.

Q Do you remember the most you ever saw?

A No.

MR. BRANDT: "If Your Honor please, I object to this. We are getting into a matter of peremptory challenges which lawyers are free to use as they see fit, and I don't

see how it shows anything."

MR. WESTERMANN: "I understand there's a case before the Supreme Court, I think it has been disposed of, that has in issue the rights of peremptory challenge of Negro jurors on a discriminatory basis. This is state action which has resulted in discrimination, and I want to be prepared to raise that issue."

JUDGE HART: "Did I understand you to say that the question has been raised whether a man could challenge anybody he wanted to?"

MR. WESTERMANN: "I think, yes. I think so."

JUDGE HART: "Well, that never was raised
[49] when I was in the courthouse."

Q Do you recall that Negroes did serve?

A Oh, yes.

Q Do you recall that there were more than one on any particular jury of twelve?

A I didn't pay any particular attention to that. If they were on the panel, as they came in the lawyers took them, and that was all—I didn't notice. I don't remember, but a few, like I told you. For a long time the colored people would come in and get excused. They didn't want to serve. Then after the question of discrimination got to be a big thing, then the Negroes began to serve without asking to be off. Now, a lot of them, even after that, that had regular jobs, and at that time the jury paid just two dollars a day, and they wanted off and we let them off because they weren't able to stand being off.

Q What I am getting at, what was the percentage of all white juries? Can we get to that?

A There were a whole lot of all white juries.

Q Do you think the percentage of all white juries relative to the total juries was over eighty percent?

A I don't think it is proper for me to guess. I would

[50] just be making a guess, if I do that. I don't keep up with that. I didn't try.

Q Do you recall having more than two jurors on any jury of twelve?

A It seems to me that two or three would be all.

Q Can you recall what you observed in this regard back in 1947 and 1948?

A No.

Q Do you recall having Negroes on the petit juries back in 1947 or 1948?

A No. No. I don't know whether that was the time that Negroes began to serve or not. It may have been before that. There were Negroes in the jury box that were summoned to come in. Some of them wouldn't come, and some of them that did come didn't want to serve, and some that came in, they had a job, and just the two dollars a day was a hardship and they asked to be let off, because they had families and things of that kind, and I felt it was my duty to let blacks off if it was injurious to their making a living.

Q On the panel from which you selected the panel of twenty-one, were there as many as ten percent Negroes on it?

A Sometimes more than that. Two or three. At that time, I never thought of this kind of question being rasied, and I didn't keep up with it. There were not too many colored people serving, no. Not until

[51] recently were they willing to serve.

Q I think it is a correct statement that there were very few or practically no Negroes serving on the petit juries in 1922. Toward the end of your term of service in 1958, you found as many as three on these final panels of twenty-one.

A I will give you my recollection of it. For a numbe

of years, I don't remember when I first went on the bench that there were Negroes on the jury at all, summoned, or on the list or anything, way back there. The jury commission was in service at that time.

Q Was this a kind of a general progression up to the time when you left the court in 1958?

A I think from 1950 to 1958 it picked up a little. That's my recollection.

There being no further questions, the witness withdrew.

HARRY G. NICHOL was called by the petitioner, and his oath being waived, testified as follows:

DIRECT EXAMINATION

Questions by Mr. Westermann:

Q Will you state your name, please, sir?

A Harry G. Nichol.

[52] Q What is your age, please, sir?

A Seventy last month. I just had a birthday.

Q Mr. Nichol, you served as Attorney General and Assistant Attorney General for Davidson County, Tennessee, for a number of years?

A Yes, sir.

Q Would you state your years of service, and in what capacity you served, particularly between 1940 and 1955.

A From 1940 to 1955, I was in the district attorney's office during that entire period. I have been in three times and out twice. The voting public sometimes don't see things right.

Q But you were in the district attorney's office from 1940 to 1955?

A Yes, sir.

Q During the year 1940 and up until 1948, were you involved in the activity of presenting cases to the grand

juries of Davidson County, Tennessee?

A Yes, sir.

Q Was anybody else in your office involved in that activity?

A Yes. I spent the greater part of my time in the grand jury division. I had had some courtroom experience. For eleven years I did not. I had an assistant who [53] worked in that division, and I had a secretary and a few officers.

Q Do you think that you observed every grand jury, personally observed members of the grand juries of Davidson County, from 1940 to 1955?

A I would say I had very close contact. Yes.

Q Do you think you saw every grand juror?

A Oh, yes.

Q Do you recall during that period of years when the first Negro served on a grand jury, between 1940 and 1955?

A I remember individually. The year, I cannot give. I remember the first one was a doctor, H. H. Walker, who happened to be also commander of the colored American Legion and a very outstanding citizen, and he served on the grand jury on two different occasions. Two different terms. That's the first one I remember, Dr. H. H. Walker.

Q Can you possibly give the year which, to the best of your recollection, is the first year he served?

A It was in the years you state. I would say early '50's. I will say this. I have been subpoenaed several times on a hearing like this, and somebody told me on one of the hearings in Division One it was '53. That might be right. It's about that.

[54] Q That's not inconsistent with your thinking?

A That's right. I have no independent recollection.

Q During your term of service as attorney general

and assistant attorney general in 1940 until 1955, did you try many cases before criminal court juries?

A In the thirties, I was the regular trial attorney, and for a period of years I was continuously in court. I don't believe that the years you gave, I was in court very much.

Q Between the years 1940 and 1948, did you have occasion to observe petit juries in criminal courts?

A Some.

Q Do you recall whether or not Negroes served on those petit juries between 1940 and 1948?

A I can't answer that for this reason. You give me years, and that's twenty years ago, and I'm not the best one in the world on time. I have seen them, but now frankly, you're talking about twenty years ago now. I have seen them many times, but I can't place the years, frankly. I do remember the grand jury, though. That was outstanding to me, and I knew them individually.

Q I would like to talk about the years from 1940 to 1950 as to petit juries. If you can't remember exactly the years they served or didn't serve, if you could [55] give me some kind of information as to the numbers of actual petit jurors who were Negroes.

A That's a matter of guess and speculation. We used to have in the clerk's office where they were listed, the name, and he would put a little "c" by it. I don't know whether those cards are still there or not. For the last several years they aren't making that identification. That's the best way I know to tell, that card system they had one time. Mr. C. H. Smith kept it, and I understand Mr. Hawkins kept it. I would have to refer to that if it's still in existence. They stopped about four years ago putting the identification.

Q You say about four years ago?

A It was about two years before I left office, and I've been gone over two years.

Q Do you think they kept all those cards?

A It was my understanding they kept them. I had no occasion to inquire, but I was interested in elections and I used to refer to them quite often, then when I was elected the last time and didn't have any intention to run, I didn't go to them.

Q But these were back in the clerk's office you say two years ago?

A Two years the first of September.

[56] Q Were many Negroes serving on grand juries then?

A I noticed in recent years they were increasing in numbers.

Q What is the highest number you ever saw, even in recent years, serving on the jury?

A I was here in the courtroom here one day, this is since I left, and I saw women and colored people constituting the majority of the jury, which was unusual odds and that just struck me when I walked in the courtroom. It was more than I had been used to.

Q Would you say there were more than——

A (Interposing) I would say ten percent was the maximum.

Q Ten percent was the maximum?

A I would say that. Yes.

Q And that includes up until two years ago?

A And I will say that's the maximum. Yes. That's just more or less speculation and guess.

Q What percentage of the juries you observed were all white?

A I have seen grand juries all white.

Q What percentage of the petit juries that you observed

over this span of years between 1940 and 1953 were all white?

A Well, most times, those in the box trying cases were white. What were in the room, and what got excused by the court, or anything like that, I can't answer that.

I would like to, but all the juries I would see was
[57] mostly in the box. I made it a rule to stay out of the jury room. I did that, and I gave my officers orders to do that, not go in the jury room.

## CROSS-EXAMINATION

Questions by Mr. Brandt:

Q General Nichol, do you remember shortly after you left office you were retained to represent a man named Findley and one named Schiveley, who were charged with raping a Negro girl from Chicago when she got off the train down here?

A I was employed in that case for a while and got out of it.

Q If I am not mistaken, I think there were five Negroes on that jury of twelve.

A Yes, sir.

Q General Nichol, as a practical matter, though, the law says that the grand jury can take cognizance of crimes in Davidson County, as a practical matter, the vast majority of the cases that the grand jury hears are cases submitted by the district attorney's office?

A About ninety-five percent, I would say.

Q And most of those are cases in which somebody somewhere along the line swore out a warrant
[58] against another person?

A That's right.

Q Usually the party doing this is a police officer?

A In most cases.

Q And it is also true, is it not, General Nichol, that

under your administration in recent years, and I'm talking about personalities, and I am sure it was the same before—Mrs. Wehby came to your office in 1948?

A Yes. I was an assistant when she came there.

Q When did she get there? In 1948? 1947?

A I thought Miss Pauline told me she had been there sixteen or seventeen years some months back. Maybe it was twenty years ago.

Q And she has been grand jury? That has been her function, primarily?

A Yes.

Q She sets the schedule for the grand jury and determines which cases and what time they will go before the grand jury?

A She does now. I had a little different arrangement. I had a man who would do the subpoenaing work, and he would set the dates. I had one man whose job was to subpoena witnesses, and he would set the dates, mark them what day and hand them to Mrs. Wehby and the rest of the staff.

[59] Q I believe now Mrs. Wehby sets all the dates?

A She sets them now.

Q Before a case is submitted to the grand jury, a lot of times a person will have another person arrested. Sometimes a survivor will swear out a warrant, or sometimes a police officer may swear out a warrant?

A That's right.

Q And a warrant would then come to the district attorney's office?

A Yes, as soon as it was bound over, it was delivered by the clerk to the district attorney's office.

Q And then the case would be evaluated sometime along the line by some lawyer in the district attorney's office?

A Yes.

Q By General Bumpus, or yourself, or somebody in that office?

A Get statements from the witnesses first, and then submit it.

MR. WESTERMANN: "If Your Honor please, I would like to object to this on the ground that it has nothing to do with this case."

MR. BRANDT: "Well, I didn't object to all those irrelevant questions of Judge Hart, and I request the same privilege."

THE COURT: "Well, what I don't need to know, I will discard it."

Q General, at some time or other, some attorney in the district attorney's office will evaluate the case, and many times, if a man is charged with burglary, he might change it to larceny, because the one who swore out the warrant swore out the wrong thing?

A Oh, yes.

Q Many times you would dismiss a case when it came back there?

A That is correct. In fact, I guess I put too much time on that. I would screen at least ninety percent of the cases.

Q When did you become district attorney?

A In 1956. January 1, 1956.

Q You say you personally——

A The majority of them, I would do that. Unless I was sure they had the right evidence, I didn't want to embarrass my men in court if they had a bad case.

THE COURT: "The Court can hardly keep from making some statements itself. Let the record show it bit its tongue."

Q Many times, you or other members of your staff

would dismiss a case that you couldn't prove?

A I had a rule that whenever a case was dismissed
[61] either myself or Mr. Bumpus, I would require them to write a full statement of the case and the facts and file it away. The reasons for it was because you could produce it if anybody invited your attention to it. They had to put the reasons and the detailed facts of the basis of dismissal.

Q Of course, this frequently occurs?

A Oh, yes. Many warrants are issued, probably hastily, and some of the judges act in haste in night court, and sometimes special judges.

Q When did you start in the district attorney's office?

A Right after the legislature was over in 1927. The legislature was over in April, and I was appointed the first of May. I was a member of that legislature.

Q And you have been in the district attorney's office, off and on, since then, until——

A (Interposing) Off and on, yes, sir, but there have been some interruptions there.

Q Do you ever recall submitting a case to the grand jury as assistant district attorney—I believe you said in the thirties you were doing grand jury work?

A In the forties.

Q So the time this man was indicted, you were
[62] doing grand jury work?

A Yes, sir.

Q Do you ever recall in your time there submitting a case to the grand jury in which you discriminated against Negroes, or any member of any race?

A I am not conscious of it. In things that have developed in recent years, I have had a lot of trouble locally, and people have said that I was biased, but I wasn't conscious of it. In recent years I have been told I was by a few in

some of these riots and things.

Q Well, let's not talk about riots and things. I am talking about a criminal case.

A I am not conscious of being biased.

Q Did you ever witness, yourself, or any other member of your staff, ever submitting a case to the grand jury or not submitting a case to the grand jury for race reasons?

A No, I did not.

Q If that had gone on during your tenure of office, would you have tolerated it?

A I would not have.

Q Have you ever known of any grand jury which has or has not acted upon a case, or refused to act upon a case because either the victim was a white person or a Negro, or the defendant was a white person or a Negro?

[63] A The grand jury acts in secrecy, but nothing has been brought to my attention like that.

At this time, the witness was dismissed and withdrew.

MR. WESTERMANN: "If Your Honor please, I would like to introduce into evidence this certified copy of the minutes from the criminal court clerk's office of the service of Dr. H. H. Walker. This indicates Dr. Walker was appointed on April 16, 1953."

THE COURT: "Let it be marked filed."

MR. WESTERMANN: "I would further like to introduce to the court a statement by the criminal court clerk that he has searched the minute books—this is a statement by Mr. Earl Hawkins as follows: 'This is to state that the minute book record of grand jurors has been searched in the criminal court clerk's office from 1943 until 1953 and no other service of H. H. Walker is found.'"

THE COURT: "Let it be marked filed."

MR. WESTERMANN: "Your Honor, concerning the fact that Mr. Nichol thinks these cards and the race of

[64] these petit jurors were listed and is still available—
I have no knowledge of that. Somehow, I thought that this information was not available."

THE COURT: "I think you will find that it is not. If you want to make an effort to get it, we will take a few minutes and let you do it."

At this time, 3:40 P.M., until 3:50 P.M., the court was in recess.'

MR. WESTERMANN: "I have no other proof."

THE COURT: "Does the state have further proof?"

MR. BRANDT: "No, Your Honor, except the court can take judicial notice of all law relative to how the jury is selected in Davidson County, both grand and petit juries."

THE COURT: "Yes, we have gone into that very much in detail in other cases that are on appeal now, touching this question. Do you want to argue this case, or do you want to call my attention to anything by way of a brief? What is your pleasure, Mr. Westermann."

MR. WESTERMANN: "Your Honor, I would like the opportunity to submit a brief on this, both relative to what we have established and what the law is that I think relates to it."

[65] THE COURT: "All right. Furnish General Brandt a copy of it."

THIS WAS ALL THE EVIDENCE ADDUCED IN THIS CASE.

At this time, 4:00 P.M., the above matter being under advisement, the court adjourned.

The Petitioner tenders this Bill of Exceptions to the ruling of The Court on his Petition for Writ of Habeas Corpus.

State Criminal Court, Proceedings

February 7th, 1969

/s/ John L. Draper
Judge

/s/ W. Westermann,
Attorney for the Petitioner

/s/ Robert Brandt
Attorney for the State

FILED: Feb. 7, 1969
Earl Hawkins, Clerk.
By: J. Shea, D. C.

## 3. EXHIBITS TO THE BILL OF EXCEPTIONS

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[Unnumbered Exhibits: Minute Entries for Criminal Court of Davidson County, January 5, 1948 (Grand and Petit Jury venire) and February 13, 1948 (Indictment of Henderson)]

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MINUTES January TERM, 5 DAY OF January 1948

Monday, January 5th, 1948

Davidson County Criminal Court
Division Two.

State of Tennessee.

Pleas at the Court House, in the city of Nashville, County of Davidson, State of Tennessee it being the first Monday in January and the fifth day thereof, 1948, of the one-hundredth seventy-second year of American Independence present and presiding the Honorable Charles Gilbert, Judge etc., of the Criminal Court of Davidson County Tennessee Division Two, when the following proceedings were had towit:

The Criminal Court, Division Two was duly opened by J. W. Charlton, Deputy Sheriff of Davidson County, Tennessee

Garner Robinson, Sheriff of Davidson County Tennessee returned into the state writ of venire facias which is in the following words and figures to wit:

December 15, 1947

To the Sheriff of Davidson County, Tennessee, greetings:

State Criminal Court, Unnumbered Exhibits,
Minute Entry for 1-5-48

You are hereby commanded to summons the following jurors, drawn and selected according to law, from which to select the Grand and Petit jurors for the ensuing January Term 1948, to appear before the Honorable Charles Gilbert, Judge etc., Division Two of the Criminal Court of Davidson County, Tennessee, Division Two, Monday morning, January 5th, 1948 at nine thirty o'clock, a.m. at the Criminal Court in Nashville, Tennessee.

| | | |
|---|---|---|
| 1. | James A. Gleaves, Sr. | Overhill Drive 111 W and 33 Donelson |
| 2. | Morris Zager | Fourth Avenue North |
| 3. | Dave Caldwell | Court House |
| 4. | Charles A. Bowen | 1206 8th Avenue South |
| 5. | Bratten Evans | Tenn. Enamel Co. 8-8971 Ellendale |
| 6. | L. C. Sanders | Post Office |
| 7. | A. S. McCord, Sr. | 217 Rayon Drive- Old Hickory 4th Dist. |
| 8. | E. A. Wright | 1406 Eastland Avenue |
| 9. | Thomas A. Williams | Hill Road 6th District |
| 10. | Will C. Murray | 2308 Brick Church Pike |
| 11. | John Wilson Frazier | 928 Broad Street or Caldwell Lane |
| 12. | Will Core | 114H District |
| 13. | Ed Potter | Commerce Union Bank |
| 20.-14. | John T. Hester | 4th District 1605 Elliston O.H |
| 21.-15. | Pierce W. Crawford | 4th District 1014 Elliston O.H |
| 22.-16. | Geo. Bradley | 4th Dist. 1108 Dodson O.H. |
| 23.-17. | Murry Sharp | Hermitage R. #1 |
| 24.-18. | K. W. Brown | 102 Orchard Rd. |
| 25.-19. | Geo. W. Russell | 409 Hadley |
| 26.-20. | Ralph Rives | Pitts |
| 27.-21. | J. H. Bright | Mt. Juliet R 3. |

| | | |
|---|---|---|
| 28.-22. | Thos. M. Gatlan | 713 Elliston O.H. |
| 29.-23. | Donnie O. Cook | Pitts O.H. |
| 30.-24. | W. R. Binkley | 807 Hadley |
| 31.-25. | O. N. McClung | Rt. #1 Old Hickory<br>4th Dist. |
| 54.-26. | Everett M. Clayton | Ellendale Ave. 7th Dist. |
| 55.-27. | John F. Eubanks | 4212 Kirkland Ave |
| 56.-28. | Roy Brown | 186 Kenner Avenue |
| 57.-29. | Joseph H. Bandy | Woodmont Blvd. |
| 58.-30. | W. W. Morehead | Walnut Drive |
| 59.-31. | E. H. Dickman | 3095 Kimberlong Rd. |
| 60.-32. | John Dillow | 1492 Woodmont Blvd. |
| 61.-33. | T. M. Harris | 3612 Saratoga Dr. |
| 62.-34. | S. W. Berger, Jr. | 1904 Woodmont |
| 63.-35. | J. M. Ewing | Bellemead Blvd. |
| 64.-36. | E. T. Proctor | Westview Avenue |
| 65.-37. | James Bolton McBryde | Lynwood Terrace |
| 66.-38. | H. G. Huddleston | Clarendon Avenue |
| 67.-39. | Norman M. Hughes | Tyne Blvd. |
| 68.-40. | Maxey Hewitt | 2600 Hillsboro Rd. |
| 69.-41. | Harold G. Lowe | 4204 Estes |
| 70.-42. | Emery P. Framback | Ensworth Avenue |
| 71.-43. | Robert L. Fox | 119 Woodmont Blvd. |
| 72.-44. | N. T. Kinzl | Leake Avenue |
| 73.-45. | Sam M. Porter | 210 Walnut Drive |
| 74.-46. | J. O. Foxall | 3714 Ashburn |
| 75.-47. | J. Harold Foxall | Page Road |
| 76.-48. | Frank W. Hager | Signal Hill Drive |
| 77.-49. | Max Friedman | Tyne Road |
| 78.-50. | M. B. Frost | Westover Drive |
| 79.-51. | Geo. Gaffney | 2808 28th Ave. So. |
| 80.-52. | Tom Fuqua | Hampton Avenue |
| 81.-53. | Geo. R. Gage | Hampton Avenue |
| 82.-54. | A. F. Anderson | 1885 Bellemeade Blvd. |

| | | |
|---|---|---|
| 83.-55. | John N. Brown | Lynwood Blvd. |
| 84.-56. | Monroe Brown | Harding Rd. |
| 85.-57. | Mark C. Brown | 105 Woodmont |
| 87.-58. | J. R. Buchanan | Marlin Avenue 7th Dist. |
| 88.-59. | Raymond S. Brooks | Valley Vista Road 7th Dist. |
| 89.-60. | Wm. M. Lellyett | 3505 Ruland Place 7th Dist. |
| 90.-61. | Maurice Lodenthal | 3507 Woodmont Lane 7th Dis |
| 91.-62. | W. P. Smith | Howell Place 7th Dist. |

Thereupon from the jury list heretofore drawn and summoned the Court appointed James A. Gleaves, Morris Zager, D. P. Caldwell, Charles A. Bowen, Bratton Evans, L. C. Sanders, A. S. McCord, Sr., E. A. Wright, Thomas A. Williams, Will C. Murray, John Wilson Frazier, Will Core, and Edward Potter as Grand Jurors for the ensuing January Term 1948.

Thereupon the Court was pleased to appoint Edward Potter Forman of said Grand Jury and said Grand Jury being duly elected, impaneled and sworn according to law were this day charged by the Honorable Charles Gilbert, Judge etc., of Division Two of the Davidson County Criminal Court and retired to consider indictments and presentments.

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the first three weeks of the ensuing January Term 1948 being from January 5th, 1948 to January 26th, 1948 to wit:

| | |
|---|---|
| John T. Hester | John W. Thomas |
| Ralph Rives | G. L. Nix |
| Frank Hager | A. M. Spinning, Jr. |
| H. M. Courtney | K, W. Brown |
| Carl W. Dunneback | N. T. Kinsley |
| Noah J. Nesbitt | William Lellyett |
| Pierce W. Crawford | H. E. Newland |
| Robert L. Fox | Paul E. Clay |
| Max Friedman | Harold J. Ashley |

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the second three weeks of the ensuing January Term 1948 being from January 26th, 1948 to February 16th, 1948 to wit:

Maxey Hewitt
Donnie O. Cook
James E. Kersley
O. M. Greenway
James B. Hodges
Ernest Blythe
J. A. Senter
C. A. Conquest
O. D. Manier
Alvin Lashlee
Richard L. Justice
Ivey Young
Thomas M. Gatlin
William P. King
Basil L. Johnson
A. C. Slaton
C. E. Denny

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the third three weeks of the ensuing January Term 1948 being from February 16th, 1948 to March 8th, 1948 to wit:

E. H. Dickson
J. F. Kennedy
C. M. Locke
W. A. Myers
William P. Ballinger
W. R. Binkley

Thereupon the following Petit Jurors were selected by the Court to serve in Division 2 for the fourth three weeks of the ensuing January Term 1948 being from March 8th, 1948 to March 29th, 1948 to wit:

E. M. Cox

Bob Briley, L. S. Castleman Jr. and Dewey Norman, Deputy Sheriffs of Davidson County, Tennessee were this day appointed by the Court to wait upon the Court during the ensuing January Term 1948.

State Criminal Court, Unnumbered Exhibits,
Minute Entry for 2-13-48

Charles Smith, Fred Toney and W. Y. Draper, Deputy Sheriffs of Davidson County, Tennessee were this day appointed by the Sheriff as Court officers to wait upon the Court during the ensuing January Term 1948.

Thereupon it appearing to the Court that the jury is incomplete the Court will issue an alias venire facias at his convenience.

State of Tennessee
County of Davidson

, I, Virginia F. Fryer , Deputy Criminal Court Clerk of Davidson County, State of Tennessee, hereby certify that the foregoing is a true and perfect copy of the Selecting of Jury For January Term, 1948, as the same appears of record on Minute Book #40, page 86-89, at office in Nashville, Tennessee.

Witness my hand and official seal of court this 11th day of December , 1968. Ordered that Court stand adjourned until tomorrow morning at 9:30 o'clock.

/s/ Virginia F. Fryer,
Deputy Criminal Court Clerk,
Davidson County, Tennessee

/s/ Charles Gilbert, Judge.

MINUTES January TERM, 13 DAY OF February 1948

Friday, February 13th, 1948

Court met pursuant to adjournment, present and presiding the Hon. Charles Gilbert, Judge etc., Division 2 of the Criminal Court of Davidson County, Tennessee, when the following proceedings were had, to wit:

XXXXXXX
XXXXXXX

A. 132

State Criminal Court, Unnumbered Exhibits
Minute Entry for 2-13-48

One Against: John Thomas Shaw, Jr. — Murder
Willie Lee Henderson and
Robert James Dodson

State of Tennessee, Davidson County
January Term of the Criminal Court, 1948

The Grand Jurors for the State of Tennessee, duly elected, impaneled, sworn and charged to inquire for the body of the County of Davidson, and State aforesaid, upon their oath aforesaid, present: that John Thomas Shaw, Jr., Robert James Dodson and Willie Lee Henderson, Col., of said county yeoman, heretofore, towit; on the 22nd day of January 1948, with force and arms, in the county aforesaid, unlawfully, feloniously, willfully, deliberately, premeditatedly and maliciously did make an assault upon the body of one William H. Cotter, inflicting grevious and mortal wounds and injuries, from which said grevious and mortal wounds and injuries the said William H. Cotter did linger, languish and die on February 12, 1948, and him the said William H. Cotter the said John Thomas Shaw, Jr., Robert James Dodson, and Willie Lee Henderson, Col., then and there did unlawfully, feloniously, willfully, deliberately, premeditatedly, and of his malice aforethought kill and murder, against the peace and dignity of the State.

And the Grand Jurors aforesaid, upon their oath aforesaid, do further present that the said John Thomas Shaw, Jr., Robert James Dodson, and Willie Lee Henderson, Col., heretofore to wit, on the 22nd day of January 1948, unlawfully, feloniously and violently did make an assault and battery upon the body of one, William H. Cotter, with the unlawful and feloniously intent then and there him, the said William H. Cotter, to rob, and to unlawfully, feloniously and violently steal, take and carry away from the person and from the

immediate presence of the [illegible] William H. Cotter the moneys goods and chattels to be found upon the person and in the immediate presence of the said William H. Cotter;

and while in the perpetration of said robbery the said John Thomas Shaw, Jr., Robert James Dodson and Willie Lee Henderson (Col) did unlawfully, feloniously, violently, wilfully, intentionally, maliciously, premeditatedly did make an assault and battery upon the body of the said William H. Cotter, with a certain pistol, inflicting grevious and mortal wounds and injuries upon the body of the said William H. Cotter, said injuries being inflicted with the intent to kill the said William H. Cotter, and upon him to commit the crime and felony of murder in the first degree from which said grevious and mortal wounds and injuries the said William H. Cotter did linger, languish and die on the 12th day of February, 1948:

Wherefore, the Grand Jurors aforesaid, upon their oath aforesaid, do present and say that the said John Thomas Shaw, Jr., Robert James Dodson, and Willie Lee Henderson, Col., of said County, heretofore to wit, on the 22nd day of January 1948, with force and arms, in the manner aforesaid, and by the means aforesaid, unlawfully, feloniously, wilfully, deliberately, premeditatedly and maliciously did kill and slay the said William H. Cotter, and did do and commit the crime and felony of murder in the first degree upon the person of the said William H. Cotter, in violation of Section 10768 of the Code of Tennessee, against the peace and dignity of the State of Tennessee.

J. Carlton Loser, Attorney General.

Endorsed: State of Tennessee vs. John Thomas Shaw, Jr., Willie Lee Henderson and Robert James Dodson.
Murder

A. 134

State Criminal Court, Unnumbered Exhibits
Minute Entry for 2-13-48

Mrs. H. L. Argo, Prosecutor.

Summon witnesses for the State: Mrs. H. L. Argo, 207 8th Ave. So. 6-9136; Gene Hooper 307 1/2 8th Ave. So. Fannie De Moss, 424 5th Ave. No. Wks. Squirrel Lodge, Joe C. Hill 119 Joyner Ave., Wks. Soldier's Club, Cedar St., Charlie Layne, 718 Jo Johnson, Wks Clements Paper Co. Harry W. Tyler, 720 27th Ave. No. Wks Soldier's Club, James Murray and Rex White, P. Cole and Richardson, Dr. Lester, St. Thomas Hospital, Luther, Balthrop and Burgess, P. Turner and West, P.

Witnesses sworn in open court and sent before the Grand Jury to testify in the above cause this 12th day of February 1948.

Edward Potter Jr., Foreman
J. Carlton Loser, Attorney General.

A True Bill: Edward Potter Jr., Foreman

Ordered that court stand adjourned until tomorrow morning at 9:30 o'clock.

/s/ Charles Gilbert, Judge

[Exhibit 1: Minute entry, Criminal Court of Davidson County, March 12, 1948 (Guilty plea of Henderson)]

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MINUTES January TERM, 12 DAY OF March, 1948

Friday, March 12th., 1948

Court met pursuant to adjournment present and presiding the Hon. Chester K. Hart Judge etc., of Division One of the Criminal Court of Davidson County when the following proceedings were had to wit:

| | | |
|---|---|---|
| 16399 | State of Tennessee | C. W. Assault Intent |
| 16401 | vs | |
| Reset | Paul Vernon Richardson | |

Came the Attorney General who prosecutes for the State and the defendant in person thereupon on motion of the defendant this case is reset for March 19th.

| | | |
|---|---|---|
| 16323 | State of Tennessee | Murder |
| P. G. | vs | |
| 1st | John Thomas Shaw, Jr. | |
| Degree | Willie Lee Henderson | |
| 99 yrs. | Robert James Dobson | |

Came the Attorney General who prosecutes for the State and the defendants in person who being arraigned upon said indictment plead guilty to murder in the first degree and for their trial put themselves upon the Country and the Attorney General doth the like.

Thereupon to well and truly assess the defendants punishment there came a jury of good and lawful men of Davidson

State Criminal Court, Exhibit No. 1, Minute Entry for 3-12-48

County to wit: J. B. Dozier, R. A. Perryman, W. T. Walker, Jim Henderson, O. S. Lashlee, N. M. Hughes, Porter Frey, J. C. Evans, John Brummitt, R. H. Underwood, A. J. Lawson, E. J. Glasgow, who being duly elected, impaneled, tried and sworn to well and truly assess the defendants punishment and a true verdict render according to the law and evidence aforesaid, upon their oath aforesaid; upon their oath aforesaid; do say: That they find the defendants guilty of murder in the first degree and assess their punishment at confinement in the State Penitentiary for a period of nintynine years.

Thereupon the jury was discharged.

It is therefore considered by the Court that the defendants for their said offense shall be confined in the State Penitentiary for a period of nintynine years commencing on the date of their delivery to the keeper thereof subject to the rules and regulations of said institution.

That they pay the cost of this prosecution for which let execution issue.

16321 State of Tennessee C. W.
Nolle vs
Willie Lee Henderson

Came the Attorney General who prosecutes for the State and the defendant in person thereupon the Attorney General with the assent of the Court entered a straight nolle herein.

Ordered that court stand adjourned until tomorrow morning at nine-thirty o'clock.

/s/ Chester K. Hart, Judge

State Criminal Court, Exhibit No. 1, Minute Entry for 3-12-48

State of Tennessee
County of Davidson

I, Robert N. Bogus , Deputy Criminal Court Clerk of Davidson County, State of Tennessee, hereby certify that the foregoing is a true and perfect copy of the Minute Book Entry , in the case of State of Tennessee vs. Willie Lee Henderson , on a charge of Murder as the same appears of record on Div. 1-61 Book, page 629 , at office in Nashville, Tennessee.

Witness my hand and official seal of court this 21 day of October ., 19 68.

/s/ Robert N. Bogus,
Deputy Criminal Court Clerk,
Davidson County, Tennessee

[Exhibit 3: Affidavit of Director of Bureau of the Census, dated September 9, 1968]

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U. S. DEPARTMENT OF COMMERCE
Bureau of the Census
Washington

September 9, 1968

I HEREBY CERTIFY, That according to the official count of the returns of the SIXTEENTH AND SEVENTEENTH CENSUSES OF THE UNITED STATES, on file in the Bureau of the Census, the total population and the population 21 years old and over, by color, for the County of Davidson, State of Tennessee, was as shown below, as of April 1, 1940 and 1950, respectively:

| | Total Population | | Population 21 Years Old and Over | |
|---|---|---|---|---|
| | 1940 | 1950 | 1940 | 1950 |
| Total Population .... | 257,267 | 321,758 | 168,337 | 211,930 |
| White ..... | 200,454 | 257,289 | 129,868 | 168,706 |
| Nonwhite ..... | 56,813 | 64,469 | 38,469 | 43,224 |

/s/ A. Ross Eckler
A. Ross Eckler
Director
Bureau of the Census

[Exhibit 4: Minute entry, Criminal Court of Davidson County, May 4, 1953 (Grand Jurors)]

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MINUTES May TERM 4 DAY OF March, 1953

Monday, May 4th, 1953

Davidson County Criminal Court
Division Two

Pleas at the Court House in the city of Nashville, County of Davidson, State of Tennessee it being the first Monday in May the fourth day thereof 1953, of the One Hundredth Seventy-Seventh year of American Independence present and presiding the Hon. Charles Gilbert, Judge etc., of the Criminal Court of Davidson County, Tennessee, Division Two, when the following proceedings were had to wit:

The Criminal Court, Division Two was duly opened by L. S. Castleman, Deputy Sheriff of Davidson County, Tennessee.

Tom Y. Cartwright, Sheriff of Davidson County, Tennessee returned into the State writ of venire facias which is in the following words and figures to wit:

State of Tennessee
County of Davidson

"To the Clerk: Subpoena all of the written named persons for jury service. Charles Gilbert, Judge 4/16/53

To the Sheriff of Davidson County, greetings:

You are commanded to summons the following jurors for the Criminal Court of Davidson County, Tennessee,

Division Two, at its May Term, 1953, to appear May 4th, 1953 at the Court House in Nashville, Tennessee.

(Filed March 12, 1969)

Of the above jurors summoned the Court appointed the following as Grand Jurors for the May Term 1953 to wit:

| | |
|---|---|
| Milton Jones | C. F. Brew |
| Kelly Hill | Gill Reece |
| Charles Burke | E. M. Buchanan |
| Milton Randolph | Sol Hyman |
| H. C. Holderfield, Sr. | Dr. H. H. Walker |
| W. T. Brown | Tom Delbridge |
| Thomas J. Carroll, Sr. | |

Said Grand Jury being duly elected and impaneled according to law of whom the Court was pleased to appoint Tom Delbridge as Foreman of said Grand Jury. Thereupon the Judge proceeded to charge said Grand Jury and after receiving the charge of the Court the Grand Jury retired to their room to consider of indictments and presentments.

Ordered that Court stand adjourned until tomorrow morning at nine-thirty o'clock.

/s/ Charles Gilbert, Judge

State Criminal Court, Exhibit No. 4, Minute Entry for 5-4-53

State of Tennessee
County of Davidson

I, Robert N. Bogus , Deputy Criminal Court Clerk of Davidson County, State of Tennessee, hereby certify that the foregoing is a true and perfect copy of the Minute Entry , in the case of State of Tennessee vs. Grand Jurors , on a charge of
as the same appears of record on Div. 11-46 Book, Page 430 , at office in Nashville, Tennessee.

Witness my hand and official seal of Court this 21 day of October , 19 68.

/s/ Robert N. Bogus,
Deputy Criminal Court Clerk,
Davidson County, Tennessee

[Exhibit 5: "Letter to Whom it May Concern," dated October 22, 1968]

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DAVIDSON COUNTY

Earl Hawkins, Clerk
Criminal Court
Tenth Judicial Circuit

Nashville 3, Tennessee

October 22nd, 1968

TO WHOM IT MAY CONCERN:

THIS IS TO STATE THAT MINUTE BOOK RECORDS OF GRAND JURORS HAVE BEEN SEARCHED IN THE CRIMINAL COURT CLERK'S OFFICE FROM 1943 TO 1953 AND NO OTHER SERVICE OF H. H. WALKER IS FOUND.

THIS THE 22ND. DAY OF OCTOBER, 1968.

/s/ Earl Hawkins
EARL HAWKINS
CRIMINAL COURT CLERK

(Filed March 12, 1969)

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# COURT OF CRIMINAL APPEALS OF TENNESSEE

[459 S.W.2d 176]

STATE of Tennessee ex rel. Willie Lee HENDERSON, Petitioner,

v.

Lake F. RUSSELL, Warden, Respondent.

July 6, 1970

Certiorari Denied by Tennessee Supreme Court

Sept. 8, 1970.

## OPINION

WALKER, Presiding Judge.

The petitioner below, Willie Lee Henderson, appeals from the dismissal of his petition for habeas corpus after an evidentiary hearing.

The petitioner, a Negro, has previously filed petitions in state and federal courts but he says that this is the first one raising the question that there had been systematic exclusion of his race from the grand jury which indicted him and the petit jury which convicted him.

In 1948 the petitioner, represented by retained counsel, entered a plea of guilty to murder in the first degree and was sentenced to 99 years in the penitentiary. He did not question the composition of the juries in the trial court,

either by motion or plea in abatement. He raises it now for the first time in this proceeding.

The petitioner was not convicted by a jury. He entered a plea of guilty voluntarily and with full understanding of its consequences. His plea of guilty was itself a conviction. Like the verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. Brooks v. State, 187 Tenn. 67, 213 S.W.2d 7.

After a voluntary plea of guilty, the right to have evidence presented to a jury to fix the punishment is a statutory one and does not rise to constitutional stature. State ex rel. Edmondson v. Henderson, 220 Tenn. 605, 421 S.W.2d 635; State ex rel. Barnes v. Henderson, 220 Tenn. 719, 423 S.W.2d 497. Likewise, the composition of a jury fixing the punishment on a plea of guilty raises no constitutional question.

Since the composition of the petit jury on a plea of guilty raises no constitutional question, the real issue is whether or not the defendant waived the right to challenge the grand jury which indicted him.

In State ex rel. Barnes v. Henderson, supra, the court said:

"On the subject of waiver it has been noted that:

'As a general rule, subject to certain exceptions, any constitutional or statutory right may be waived if such waiver is not against public policy. In fact, the trend of modern authority is in favor of the doctrine that a party in a criminal case may waive irregularities and rights, whether constitutional or statutory, very much the same as in a civil case. Some jurisdictions, however, regard certain rights

as nonwaivable in capital cases, or even in felony cases generally. * *

'Where a constitutional right accorded the accused is treated as waivable, it may be waived by express consent, by failure to assert it in apt time, or by conduct inconsistent with a purpose to insist upon it.' 21 Am.Jur.2d Criminal Law, § 219."

Under the criminal procedure in this state, objection to the venire or the indictment is deemed waived unless raised in apt time by motion or plea in abatement.

In State ex rel. Lawrence v. Henderson, Tenn.Cr.App., 433 S.W.2d 96, 101, this court said:

"If the defendant does not object by motion or plea in abatement, to the venire or to the jurors summoned under it, before he pleads to the indictment, an objection thereafter is too late."

See also Parker v. State, 2 N.C.App. 27, 162 S.E.2d 526 (1969), and Hamilton v. State of Alabama, 283 Ala. 660, 220 So.2d 267 (1969). In those cases, the Court of Appeals of North Carolina and the Supreme Court of Alabama held too late a claim in postconviction proceedings that members of petitioner's race had been systematically excluded from the juries when no such question was presented at his trial.

The petitioner here participated as an actor in the order which he now seeks to set aside. After due and thoughtful consideration and after being properly advised by his retained counsel, he entered a plea of guilty to murder in the first degree and took the known sentence of 99 years rather than take the calculated risk of receiving a more severe penalty at the hands of a jury. See Ray v. State, Tenn., 451 S.W.2d 854 (1970).

We hold that petitioner, acting through his employed attorney, waived any objection to the composition of the grand jury or the petit jury, by his failure to proceed in apt time to question them in the trial court.

Federal courts hold that objection to the racial composition of a grand jury must be raised before trial and may not be presented for the first time on a motion to vacate or by writ of error coram nobis. This rule offends no constitutional right.

In Bustillo v. United States, 421 F.2d 131, 132, (5th Cir.), the petitioner filed a 28 U.S.C.A. Sec. 2255 motion to vacate his sentence, claiming that the grand jury which indicted him was defectively constituted. Two years before this proceeding, he had entered a plea of guilty to bank robbery. Affirming denial of the motion without a hearing, the court said:

"Objections to the composition of a grand jury are governed by Rule 12(b) (2) of the Federal Rules of Criminal Procedure. Shotwell Manufacturing Company v. United States, 1963, 371 U.S. 341, 83 S. Ct. 448, 9 L. Ed. 2d 357. Rule 12(b) (2) provides that a defect in the indictment must be objected to by motion before trial and that failure to object at that time waives such a defense. Bustillo did not object before trial, or at any other time during the proceeding on the merits, to the composition of the grand jury which indicted him. His failure to do so constituted a waiver so that he may not now for the first time assert such an objection. Scales v. United States, 1961, 367 U.S. 203, 81 S. Ct. 1469, 6 L. Ed. 2d 782; Jackson v. United States, 5 Cir. 1968, 394 F.2d 114, 115; Perez v. United States, 5 Cir. 1962, 303 F.2d 441."

In Jackson v. United States, 394 F.2d 114, the Court of Appeals (5th Cir., 1968) considered an objection to the racial composition of the grand jury presented by writ of error coram nobis. It held:

"He is likewise barred from raising the question of the composition of the grand jury on the allegation of racial exclusion, being required by Rule 12(b) (2) of the Federal Rules of Criminal Procedure to allege such a defect by motion before trial, which he did not do then or at any other time during the proceeding on the merits. His failure to do so constitutes a waiver thereof so that he may not now, for the first time, more than two years after his trial, question the composition of the grand jury which indicted him, the Trial Judge having correctly held that he was in no way prejudiced."

In Atlas Roofing Manufacturing Company v. Parnell, 409 F.2d 1191 (5th Cir., 1969), the court said:

"In the absence of actual bias or prejudice, an objection to the composition of the grand or petit jury panel comes too late after the verdict."

By a state prisoner's habeas corpus proceeding in Hayes v. Wainwright, D.C., 302 F. Supp. 716 (1969), the petitioner claimed that Negroes were systematically excluded from serving on grand juries. Finding no merit in his contentions, the court said:

"In any event, petitioner having failed to raise an attack upon the grand jury's composition at the time of his trial cannot now raise the issue."

In Doyle v. State, Tenn.Cr.App., 458 S.W.2d 637 (cert. denied April 20, 1970), by post-conviction proceedings, the petitioner objected to the racial composition of the grand

and petit juries which indicted and tried him. Speaking for the court, Judge Russell held:

"We hold, however, that his right to raise this question was waived when it was not waived upon the trial by motion or plea in abatement prior to his pleading to the indictment. Discrimination in the composition of venires has long been condemned in Tennessee. See Zanone v. State, 97 Tenn. 101, 36 S.W. 711. It has also been held in Tennessee, in a long line of cases, that unless a defendant objects by motion or plea in abatement to the venire before he pleads to the indictment he cannot thereafter avail himself of a claim that the venire was improperly composed. State v. Cole, 28 Tenn. 626; McTigue v. State, 63 Tenn. 313; Turner v. State, 89 Tenn. 547, 15 S.W. 838; Ellis v. State, 92 Tenn. 85, 20 S.W. 500. See also State ex rel. Lawrence v. Henderson, Tenn.Cr.App., 433 S.W.2d 96. We do not believe that one should be permitted to raise a question in a post conviction proceeding that was waived by failure upon the trial, by design or otherwise, to timely raise it when our procedural law prescribes that it should be raised. To permit this type procedure would make a sham of the trial itself. A defendant would not raise such questions upon the trial in the hope that he would be acquitted, but with the assurance that he could avail himself of the complaint post conviction to obtain a new trial. We hold that this question was disposed of upon the trial adversely to Doyle when it was not then raised. We are not dealing with a constitutional principle newly announced since his trial, but a right well recognized and protected at that time."

We held to the same effect in Burt v. State, Tenn.Cr. App., 454 S.W.2d 182 (cert. denied May 4, 1970).

From these authorities, it results that the judgment of the lower court dismissing the petition is affirmed.

GALBREATH, Judge (concurring).

I concur completely with Judge Walker's opinion. The law that failure to make an objection to the racial composition of a Grand Jury is waived unless raised by an appropriate pretrial motion is too well settled for this Court to disturb. I recognize the irrationality of the law as it applies to ancient cases of this type. No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade. But the law is as set forth in Judge Walker's opinion; and it must be changed, if ever it is (and I personally believe it will be soon or late), by an authority higher than this Court.

OLIVER, Judge (dissenting).

I am unable to concur in the result reached by the majority. Some further discussion of this case is appropriate.

This is the same petitioner involved in the case of Willie Lee Henderson v. C Murray Henderson, Warden, in which the Supreme Court of this State reversed the same trial court and remanded the case for an evidentiary hearing in an unpublished opinion filed November 3, 1967. In that opinion, the Court said:

"This is the second petition for the writ of habeas corpus filed by petitioner to reach this Court. The only allegation contained in the present petition, other than

those disposed of by a unanimous opinion released on September 9, 1966, is a dogmatic statement there was a systematic exclusion of Negroes from serving on the grand and petit juries in Davidson County at the time of the indictment and petitioner's trial.

"The trial judge summarily dismissed the petition without a hearing.

"Petitioner has perfected an appeal to this Court and assigned as error the failure of the trial judge to hold an evidentiary hearing on the allegation of systematic exclusion of members of petitioner's race from the grand and petit juries in Davidson County.

"Respondent insists by his plea of not guilty the petitioner waived his right to question the legality of the grand jury which indicted him and the petit jury which convicted him.

"A systematic exclusion of Negroes from jury service is a denial of due process of law as required by the Fourteenth Amendment to the Constitution of the United States. Eubanks vs. State of Louisiana, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. (2d) 991 (1958).

> 'Where Negroes are systematically excluded from both grand jury which indicted a colored petitioner, and from the petit jury which convicted him, the judgment is unconstitutional and void.' Harris vs. State of North Carolina [D.C.], 240 F.Supp. 985 (1965); United States, ex rel. Goldsby vs. Harpole [5 Cir.,] 263 F.(2d) 71 (1959).

* * *

"Evidence that none, or very few Negroes have served as jurors over an extended period of time will establish

a prima facie case. United States, ex rel. Goldsby vs. Harpole, supra; United States, ex rel. Seals vs. Winan, 304 F.(2d) 53 (1962); Arnold vs. North Carolina, 376 U.S. 773, 84 S. Ct. 1032, 12 L. Ed. (2d) 77 (1964).

> 'While a full evidentiary hearing may not be warranted or proper for every petition for habeas corpus in this State, nevertheless, a petition alleging sufficient facts to establish that petitioner's conviction was void because of alleged denial of constitutional rights, federal or state, necessitates a trial of those facts under the aforesaid Act. The attack on a criminal judgment on the ground that it is void because of lack of constitutional due process deserves particular scrutiny.' State [ex rel. Reed] vs. Heer, —Tenn., —, 403 S.W.(2d) 310 (1966).

"From the above principles, we think it was error for the trial judge to have summarily dismissed the petition. We think he should have appointed an Attorney to represent petitioner with leave to amend the petition to allege such facts, if possible, which, if proven, would support the allegation that members of his race were systematically and deliberately excluded from the grand jury which indicted him and the petit jury which convicted him.

"The question of whether petitioner waived his right to raise the issue of systematic exclusion of members of his race by his plea of guilty is a question to be determined from the facts. United States, ex rel. Goldsby vs. Harpole, supra; United States, ex rel. Seals vs. Winan, supra."

The Supreme Court's judgment entered in that case included the following:

Opinion, Tennessee Court of Criminal Appeals

"This cause coming on to be heard upon a transcript of the record from the Criminal Court of Davidson County, assignments of error and reply brief, upon consideration whereof the Court is of opinion that in the judgment of the Court below there is error in that an evidentiary hearing was not granted plaintiff in error on the question of systematic exclusion of Negroes from the grand and petit juries in Davidson County at the time of plaintiff in error's indictment and trial."

Of course, we may take judicial notice of prior proceedings by the same petitioner. State ex rel. Wilkerson v. Bomar, 213 Tenn. 499, 376 S.W.2d 451.

After the remand the present petition was filed, the petitioner and appointed counsel evidently preferring to make a new start in view of the Court's language about appointing counsel to assist the petitioner in preparation of a factual petition. This case is now before us upon appeal from the trial court's judgment dismissing that petition following an evidentiary hearing as directed by the Supreme Court. Upon the evidence introduced at that hearing there can be no doubt whatever that Negroes were deliberately and systematically excluded from the Grand Jury which returned the indictment against this petitioner, at the February 1948 Term of the Davidson County Criminal Court. He testified that at the time of his trial he was 20 years of age and was represented by an attorney employed by his mother; that he did not at that time have any knowledge concerning the methods of selecting people to serve on the grand or petit juries, or concerning his rights; that his attorney never talked to him about those matters or advised him concerning his rights to a properly constituted Grand Jury and petit jury; and that no Negroes were included in the Grand Jury which indicted him.

The judge who presided at Henderson's original trial, who served as a Criminal Judge in Davidson County from September 1, 1922 until his retirement on August 31, 1958, was called as a witness by the petitioner. He testified that he never placed a Negro on the Grand Jury, notwithstanding Negroes were called for jury duty; that the first Negro to serve on a Grand Jury during his tenure was Dr. H. H. Walker; that in 1947 the Legislature changed the jury law of Davidson County (Chapter 53, Private Acts of 1947) and that the new jury law did not limit the judges of the Criminal Court to the jury list furnished by the Jury Commission; that "Some of them[Negroes in the jury box] wouldn't come, [when summoned] and some of them that did come didn't want to serve and some that came in, they had a job, and just the two dollars a day was a hardship and they asked to be let off, because they had families and things of that kind, and I felt it was my duty to let blacks off ff it was injurious to them making a living." Of course, he was referring to Section 7 of the Chapter 53 of the Acts of 1947 which provided, among other things, that in selecting the Grand Juries, the Criminal Court Judges were not confined to the jury list and were permitted to select members of the Grand Jury from the County at large. "* * * and the judges could select whomever they thought would make good grand jurors, and we were not in any way, as I recall, limited in our judgment on the matter. We could use our best judgment." "Sometimes, when I would get the jury list, if I found people on there that I thought would make good grand jurors, I selected some from there. I used my own judgment as to what I thought would be the best panel of jurors that I could get." "It wasn't a question of whether he was black or white. As I said a while ago, I selected grand juries that I thought would give everybody a fair deal all the way through and a grand jury that if I

was charged, I would have wanted to pass on mine." Asked whether he generally selected persons whom he knew, the judge said, "Well, I knew them, or knew of them. I wouldn't say I knew everybody on the grand jury before I put them on, but I had information about them, what kind of people they were, before they went on the grand jury. I didn't select anybody at random for the grand jury." He testified that he and the other Criminal Judge of the County alternated in selecting the Grand Juries.

The record shows that Dr. H. H. Walker, referred to by the judge who presided at the petitioner's original trial as the first Negro who served on the Grand Jury during his tenure as Criminal Judge served on the Grand Jury empaneled for the May Term of 1953, more than five years after the petitioner was indicted. This record also shows that during the years from 1940 to 1950, approximately 25 per cent of the Davidson County population over 21 years of age was non-White.

The former District Attorney General of Davidson County, testifying as a witness for the petitioner, said that during the period from 1940 to 1955 he worked with the Grand Juries of the County and that Dr. Walker was the first Negro to serve on a Grand Jury during that period.

The petitioner introduced an affidavit of his original trial counsel, in which that attorney stated that he had no knowledge that members of the petitioner's race had been systematically excluded from service on the grand and petit juries of Davidson County or from those involved in the petitioner's indictment and trial, and that he had no occasion to advise the petitioner concerning the composition or method of selection of people for grand and petit jury service, nor concerning his rights in such matters.

Manifestly, this record, showing that no Negro served on a Grand Jury in Davidson County from September 1922 until the May Term of 1953, which was long after Henderson's indictment, positively establishes a prima facie case of proscribed exclusion of members of Henderson's race. The State made no attempt to rebut the prima facie case thus established.

The judge who heard this petition based his judgment of dismissal solely upon his conclusions and findings that "* * * there is absolutely no showing in the record before us that any segment of the community has been systematically or deliberately excluded by reason of race or color and we, therefore, conclude that there is no proof to establish the allegations of the petition and it must necessarily be dismissed." In arriving at that conclusion the court also said:

> "While the legal question of waiver raised by the answer of the respondent could well be a valid one, the issue was not resolved on that question but an evidentiary hearing was had and the decision rests on the result of that hearing. The question is was there a systematic exclusion of Negroes from both grand and petit juries which violated his constitutional rights."

In my opinion the evidence adduced at the hearing upon this petition concerning the composition of the Davidson County Grand Juries from 1922 until May of 1953, does not sustain the conclusions and findings of the trial judge. As I view it, the uncontroverted evidence conclusively demonstrates that Negroes were systematically and purposefully excluded from serving on the Grand Juries of Davidson County. With the adult Negro population being what it was, no other explanation is apparent from this record for completely omitting them from Grand Jury

membership over such a long period of time. It would seem strange indeed that the judges, who had responsibility for selecting the Grand Jurors, could find no Negroes worthy of serving on a Grand Jury, and to whom such service would not have been an extraordinary economic hardship. The Supreme Court of the United States has held that the "indisputable fact that no Negro had served on a criminal court grand or petit jury for a period of thirty years created a very strong showing that during that period Negroes were systematically excluded from jury service because of race. *** [imposing a duty on the State] to try to justify such an exclusion as having been brought about for some reason other than racial discrimination." Patton v. State of Mississippi, 332 U.S. 463, 466, 68 S. Ct. 184, 186, 92 L. Ed. 76

It is fundamental that systematic exclusion of Negroes from Grand Jury service because of their race violates the Fourteenth Amendment of the United States Constitution. Patton v. State of Mississippi, supra, and cases there cited. In Reece v. State of Georgia, 350 U.S. 85, 76 S. Ct. 167, 100 L. Ed. 77, the Court said:

> "This Court over the past 50 years has adhered to the view that valid grand jury selection is a constitutionally protected right. The indictment of a defendant by a grand-jury from which members of his race have been systematically excluded is a *denial of his right to equal protection of the laws.*" (Emphasis supplied)

And in Eubanks v. Louisiana, 356 U.S. 584, 78 S. Ct. 970, 2 L. Ed. 2d 991, wherein systematic exclusion of Negroes from Grand Jury duty was established, the Court said:

> "In an unbroken line of cases stretching back almost 80 years this Court has held that a criminal defendant is

*denied the equal protection of the laws guaranteed by the Fourteenth Amendment* if he is indicted by a grand jury *or* tried by a petit jury from which members of his race have been excluded because of their race.

* * *

"In Patton v. State of Mississippi, 332 U.S. 463, 469, 68 S. Ct. 184, 187, 92 L. Ed. 76, this Court declared, in a unanimous opinion, that 'When a jury selection plan, whatever it is, operates in such way as always to result in *the complete and long-continued exclusion of any representative at all from a large group of Negroes, or any other racial group*, indictments *and* verdicts returned against them by juries thus selected cannot stand.' This is essentially the situation here. *True, the judges now serving on the local court testified generally that they had not discriminated against Negroes in choosing grand juries, and had only tried to pick the best available jurors.* But as Chief Justice Hughes said for the Court in Norris v. State of Alabama, 294 U.S. 587, 598, 55 S. Ct. 579, 584, 79 L. Ed. 1074, *'If, in the presence of such testimony as defendant adduced, the mere general assertions by officials of their performance of duty were to be accepted as an adequate justification for the complete exclusion of negroes from jury service, the Equal Protection Clause —adopted with special reference to their protection— would be but a vain and illusory requirement.'* Compare Reece v. State of Georgia, 350 U.S. 85, 88, 76 S. Ct. 167, 169, 100 L. Ed. 77; Hernandez v. State of Texas, 347 U.S. 475, 481, 74 S. Ct. 667, 671, 98 L. Ed. 866. This is particularly true here where several of the parish judges apparently have never even interviewed a Negro in selecting grand jurors.

*We are reluctantly forced to conclude that the uniform and long-continued exclusion of Negroes from grand juries shown by this record cannot be atributed to chance, to accident, or to the fact that no sufficiently qualified Negroes have ever been included in the lists submitted to the various local judges.* It seems clear to us that Negroes have been consistently barred from jury service because of their race." (Emphasis supplied.)

So, it is no longer open to question or debatable that a Grand Jury racially segregated systematically and deliberately by excluding members of a race is unconstitutionally constitu and void insofar as proceedings against members of the excluded race are concerned. And it is equally incontestable that an indictment against a member of the excluded race by such an unconstitutional Grand Jury is likewise unconstitutional and void. It could not possibly be otherwise. Obviou a racially unconstitutional Grand Jury is impotent and incompetent to return a valid indictment against a member of the race whose systematic exclusion therefrom renders it unconstitutional as to them. "Therefore, it necessarily follows that the indictment of a Negro defendant by a grand jury in a state court from which members of his race have been intentionally excluded solely because of their race is not good, for the reason that as to such Negro defendant it is not a legal grand jury. ***" State v. Covington, 258 N.C. 501, 128 S.E.2d 827. See also State ex rel. Hathaway v. Henderson, Tenn. Cr. App., 432 S.W.2d 503.

The majority opinion completely bypasses and ignores the question of systematic exclusion of Negroes from the Grand Jury which returned the indictment against the petitioner. Instead, that opinion is predicated wholly upon the proposition that the petitioner is now estopped to raise that question, on the theory that he waived the compos

of the Grand Jury by entering a plea of guilty and by not raising the question before he went to trial. However, the clear implication of the majority's position is that systematic exclusion of Negroes from Grand Jury service in Davidson County is considered to have been a fact.

It is easy in situations of this kind to lose sight of the real issue when the question concerns the racial composition of the Grand Jury. The determinative issue in such cases, as in this case, is not simply the illegal composition of the Grand Jury, per se, because Negroes were systematically and deliberately excluded therefrom. But rather, the presiding and decisive question is whether the indictment returned against a member of the excluded race by such a racially segregated Grand Jury was void and constituted no legal basis for a valid prosecution.

Inasmuch as the majority opinion is rested solely upon the proposition that by pleading guilty and not raising the question before going to trial, the defendant waived the composition of the Grand Jury and is now precluded from complaining collaterally about those matters, it is necessary to consider the waiver question.

In Shepard v. Henderson, Tenn. Cr. App., 449 S.W.2d 726, we reiterated the firmly established rule of law that a plea of guilty, understandingly and voluntarily entered on the advice of counsel, constitutes an admission of all facts alleged and a waiver of all *non-jurisdictional* and procedural defects and constitutional infirmities, if any, in any prior stage of the proceeding.

But an indictment is jurisdictional. "A lawful accusation is an essential element of a common-law trial by jury, either upon indictment for felonies and capital offenses or by information for misdemeanors. Such an accusation is jurisdictional;

without it there can be no valid prosecution." So said the Supreme Court of this State in State v. Hughes, 212 Tenn. 644, 371 S.W.2d 445, quoting with approval from Wharton's Criminal Law & Procedure (Anderson) Vol. 4, § 1724, at page 506.

"A valid warrant or indictment is an essential of jurisdiction." State v. Covington, 258 N.C. 501, 128 S.E.2d 827. "A valid indictment returned by a legally constituted grand jury is a jurisdictional requirement." Gibbons v. Territory, 5 Okl. Cr. 212, 115 P. 129.

Such is the general law. In 22 C.J.S. Criminal Law §143, pp. 379-380 the rule is thus stated:

> "Jurisdiction to try and punish for a crime cannot be acquired by the mere assertion of it, or invoked otherwise than in the mode prescribed by law, and if it is not so acquired or invoked any judgment is a nullity.
>
> Ordinarily, a formal accusation, which charges some offense known to law, is essential for every trial for crime, without which the court acquires no jurisdiction to proceed, even with the consent of accused, see infra § 147, and where the law requires a particular form of accusation, that form of accusation is essential. ***
>
> "Jurisdiction to try offenses is ordinarily acquired by an indictment, or in some jurisdictions by an information, and *where the indictment or information is invalid the court is without jurisdiction*." (Emphasis supplied.)

And it is said in 22 C.J.S. Criminal Law § 147, pp. 393-396:

> "Since jurisdiction of an offense or its subject matter must be conferred by law, it is usually held, as a general rule, that jurisdiction to take cognizance of an offense

or to render a particular judgment cannot be conferred solely on a court by the consent of accused, either express or inferential, or by any fiction of presumption, waiver, or estoppel.

* * *

"By pleading guilty or not guilty to an accusation of a crime of which the court has jurisdiction, jurisdiction of the person is conferred on such court; but this is not so as to an offense of which the court has no jurisdiction."

22 C.J.S. Criminal Law § 162, p. 421 states the rule in this language:

"Generally, where accused pleads to the merits of the action, he waives all objections with respect to the court's jurisdiction of his *person*. So, the objection that the court has no jurisdiction of the *person of accused*, whether by reason of some irregularity in the proceedings, or because of some defect in the constitution of the court which does not prevent it from being a de facto court, or for other reasons, is waived by accused pleading not guilty and going to trial, or by pleading guilty, unless accused is properly permitted to withdraw his plea. *However, the objection that the court does not have jurisdiction of the offense or subject matter is not waived by a plea or going to trial, and may be asserted at any time.*" (Emphasis supplied.)

A further statement of the rule is found in 27 Am. Jur., Indictments & Informations, § 187, p. 731-732:

"It is the general rule that defects or omissions in the indictment or in the mode of finding the indictment, *which are of such a fundamental character as to make*

*the indictment wholly invalid, are not subject to waiver by the accused. Such fundamental defects or omissions are not waived by failure to raise them by preliminary motion or plea or in some other appropriate manner during the trial or by pleading to the merits.*" (Emphasis supplied.)

There is a clear and well-defined distinction, frequently lost sight of, between those indictments containing mere irregularities or deficiencies and those that are wholly void. This distinction between the voidable and the void was expressly recognized by our Supreme Court in Robinson v. City of Memphis, 197 Tenn. 598, 277 S.W.2d 341, wherein the Court said:

"The probability is that the trial judge thought that the objection to the warrant came too late, since it was not made until after the entry of judgment. In taking that view of the matter, if he did, the trial judge inadvertently failed, as we sometimes do, to draw the distinction between that which is void, on the one hand, and, on the other hand, that which is voidable only."

In State v. Covington, supra, the Negro defendant was convicted upon his pleas of guilty on indictments which he had previously moved unsuccessfully to quash on account of asserted intentional exclusion of Negroes from the Grand Jury. The defendant moved to quash the three indictments involved before pleading, as required by a State statute providing, in substance, that such objections to an indictment based on defects and irregularities in the drawing or organization of the Grand Jury must be made by motion to quash the indictment before the jury is sworn and empaneled to try the issue. Reversing, the Supreme Court of North Carolina said:

There is abundant authority that *a plea of guilty does not waive a jurisdictional defect*. Weir v. United States, 7th Cir., 92 F.2d 634, 114 A.L.R. 481; People v. Green, 368 Ill. 242, 13 N.E.2d 278, 115 A.L.R. 348; Berg v. United States, 9th Cir., 176 F.2d 122; 22 C.J.S. Criminal Law § 424(7); ibid., § 162; 4 Wharton's Criminal Law and Procedure, by Ronald A. Anderson, § 1901, p. 770. See People v. Green, 329 Ill. 576, 161 N.E. 83.

* * *

"Courts indulge every reasonable presumption against a waiver by a defendant charged with crime of fundamental constitutional rights, and do not presume acquiescence in their loss. Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L.Ed. 680; Johnson v. Zerbst, 304 U.S. 458, 58 S. Ct. 1019, 82 L.Ed. 1461, 146 A.L.R. 357; Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 57 S. Ct. 809, 81 L. Ed. 1177; Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 57 S. Ct. 724, 81 L. Ed. 1093.

In Johnson v. Zerbst, supra, the Court said, 'A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.'

"* * * Under these circumstances, it is our opinion, and we so hold, *defendant, by his subsequent pleas of guilty in each case, has not waived his objection to the grand jury which indicted him on the ground that it was illegally impanelled and composed in violation of his fundamental constitutional rights, and on the ground that because of a fundamental constitutional prohibition the grand jury was without jurisdiction to find valid indictments against him, a Negro.*" (Emphasis supplied.)

The general rule is well settled in this State that mere irregularities, deficiencies and defects *in otherwise valid indictments* are waived by going to trial without raising objection thereto. Allen v. State, 199 Tenn. 569, 288 S.W.2d 439; Jones v. State, 197 Tenn. 667, 277 S.W.2d 371; Driscoll v. State, 191 Tenn. 186, 232 S.W.2d 28; Johnson v. State, 187 Tenn. 438, 215 S.W.2d 816; Estep v. State, 183 Tenn. 325, 192 S.W.2d 706; Erby v. State, 181 Tenn. 647, 184 S.W.2d 14; Blackman v. State, 169 Tenn. 197, 83 S.W.2d 899; French v. State, 159 Tenn. 451, 19 S.W.2d 276; State ex rel. Scroggins v. Rice, 159 Tenn. 473, 19 S.W.2d 227; Pope v. State, 149 Tenn. 176, 258 S.W.775; Palmer v. State, 121 Tenn. 465, 118 S.W. 1022; Whim v. State, 117 Tenn. 94, 94 S.W. 674; State ex rel. Lawrence v. Henderson, Tenn.Cr.App., 433 S.W.2d 96, 101, cited in the majority opinion, wherein the petitioner's only complaint with respect to the juries was that he did not receive a copy of the indictment or one of the Grand Jury panel, neither of which he made any request for.

However, it is to be noted that in none of the foregoing cases, nor in any other as far as I can ascertain, has our Supreme Court said that a void indictment is waived by failure to object on that ground before entering a plea, or that, absent such a preliminary challenge, a void indictment is cured by a verdict of guilty. To so hold would be an abrogation of the cardinal constitutional principle that a lawful accusation is an essential jurisdictional element of a criminal trial, without which there can be no valid prosecution. State v. Hughes, supra; State v. Covington, supra; Gibbons v. Territory, supra, and the other authorities above quoted.

In Cobb v. Balkcom, 339 F.2d 95, 101-102 (5th Cir. 1964) these significant statements were made:

"In summary, then, the prior decisions of this court have established three situations, all capital cases, in which a state criminal defendant's failure to object to jury composition will not constitute a waiver barring relief on federal habeas corpus. If defendant's counsel fails to consult with him concerning his rights (Harpole) [United States ex rel. Goldsby v. Harpole, 263 F.2d 71 (5th Cir. 1959), cert. den. 361 U.S. 838, 80 S. Ct. 58, 4 L. Ed. 2d 78], or where there is failure to consult plus the fact that the evidence of systematic exclusion is neither known nor easily ascertainable at the time of trial (Wiman) [United States ex rel. Seals v. Wiman, 304 F.2d 53 (5th Cir. 1962), cert. den. 372 U.S. 915, 83 S. Ct. 717, 9 L. Ed. 2d 722], or where the defendant or his counsel failed to object through fear of engendering hostility (Whitus) [Whitus v. Balkcom, 333 F.2d 496 (5th Cir. 1964)], there is no valid waiver. In Harpole the waiver was ineffective as to the trial jury, but the plus facts of Wiman and Whitus made the waiver ineffective as to both juries.

"We think this case is controlled by Harpole. Trial counsel did not discuss the right with Cobb or his mother or anyone acting for Cobb. There was no express waiver by Cobb either of his right to challenge the grand jury indictment or the trial jury. His lawyer was satisfied with the grand and trial juries, but this is insufficient. Moreover, considering Cobb's age and inexperience, the fact that he never had a lawyer until after indictment, and the known illegal composition of the grand jury, we feel that Harpole should be extended to cover the grand jury in the present case. In sum, there was no intentional

relinquishment of a known right within the purview of the majority opinion in Fay v. Noia [372 U.S. 391, 83 S. Ct. 822, 9 L. Ed. 2d 837], and for the state to subject a defendant to this situation amounts to a denial of due process and equal protection of the laws guaranteed by the Fourteenth Amendment. What constitutes a valid waiver in this instance is a federal question, and with all deference to the Supreme Court of Georgia, we hold that Cobb's federal rights were not abandoned."

See also: Labat v. Bennett, 365 F.2d 698 (5th Cir. 1966), and McNeil v. State of North Carolina, 368 F.2d 313 (4th Cir. 1966) on subject of waiver in state court.

Moreover, the rule that habeas corpus is not available to test the sufficiency of indictments (Knewel v. Egan, 268 U.S. 442, 446, 45 S. Ct. 522, 69 L. Ed. 1036; Underwood v. Bomar, 335 F.2d 783 (6th Cir. 1964), cert. den. 380 U.S. 921, 85 S. Ct. 917, 13 L. Ed. 2d 805; State ex rel. Carroll v. Henderson, Tenn. Cr. App., 443 S.W.2d 689), is not a mechanical one. When an indictment is so fatally defective as to deprive the court of jurisdiction it may be reviewed in habeas corpus proceedings. McCoy v. Pescor, 145 F.2d 260 (8th Cir. 1944), cert. den. 324 U.S. 868, 65 S. Ct. 911, 89 L. Ed. 1423, rehearing denied 325 U.S. 891, 65 S. Ct. 1083, 89 L. Ed. 2004; Knight v. Hudspeth, 112 F.2d 137 (10th Cir. 1940), cert. den. 311 U.S. 681, 61 S. Ct. 62, 85 L. Ed. 439, In State ex rel. Smith v. Johnson, 220 Tenn. 49, 413 S.W.2d 694, the indictment was attacked in a habeas corpus petition on the same basis as in the present case and our Supreme Court did not once intimate any belief that the question is not reviewable by habeas corpus.

So, the reason our Supreme Court reversed the trial court and remanded this petitioner's preceding identical

petition for an evidentiary hearing clearly appears. That Court certainly recognized that these questions are not waived in this State by failure to raise them before going to trial, and that they may be raised and determined in post-conviction proceedings. Had the Court thought otherwise, an evidentiary hearing patently would have been a futulity and would not have been ordered, for the simple reason that such a hearing would not have been necessary if the questions presented were waived by the petitioner's failure to raise them prior to going to trial, and the Court would have simply affirmed the trial court's judgment dismissing the case without an evidentiary hearing. The above-quoted language employed by our Supreme Court in remanding the case for an evidentiary hearing demonstrates that the Court was fully cognizant that under established principles of law the petitioner's conviction and sentence were constitutionally void if he was tried and convicted upon a void indictment.

Bustillo v. United States, 5 Cir., 421 F.2d 131, 132 and Jackson v. United States, 5 Cir., 394 F.2d 114, cited in the majority opinion, invoke statutory federal rules of criminal procedure imposing definite time limitations within which exceptions to Grand Jurors on account of their disqualifications and indictments returned by allegedly invalid Grand Juries may be raised, and providing that unless raised within the prescribed time such objections are waived. Hayes v. Wainwright, D.C., 302 F. Supp. 716 (apparently predicated upon the same federal rules because Jackson v. United States, supra, is cited as authority for the Court's holding) is also cited in the majority opinion. Some states have similar statutes. See State v. Covington, supra, and State v. Wilson, 204 La. 24, 14 So. 2d 873, appeal dism. 320 U.S. 714, 64 S. Ct. 202, 88 L. Ed. 419: There is

no such statutory time limitation in this State, and, consequently, cases involving such restrictive statutory rules are inapplicable and offer no assistance in the resolution of the question before us in this case. Rather, the Supreme Court of Tennessee has promulgated the variable standard that objections to the Grand Jury or its proceedings must be raised at the first opportunity. Turner et al. v. State, 187 Tenn. 309, 213 S.W.2d 281; Bonds v. State, 220 Tenn. 555, 421 S.W.2d 87.

The authorities hereinabove cited make it abundantly clear that no waiver is or can be imputed to one whose criminal conviction and sentence is unquestionably void. Extensive research has not disclosed a case in which any court has denied relief sought collaterally where the conviction and sentence appeared indisputably and conclusively void. Due process and equal protection of law, preserved for all by our Constitution, command that no such practice as that disclosed by this record shall be resorted to or permitted to consign any person to prison upon a void conviction.

In Coppedge v. United States, 369 U.S. 438, 449, 82 S. Ct. 917, 923, 8 L. Ed. 2d 21, the United States Supreme Court said this:

> "* * * When society acts to deprive one of its members of his life, liberty or property, it takes its most awesome steps. No general respect for, nor adherence to, the law as a whole can well be expected without judicial recognition of the paramount need for prompt, eminently fair and sober criminal law procedures. The methods we employ in the enforcement of our criminal law have aptly been called the measures by which the quality of our civilization may be judged."

For this Court, or any court, to approve and thus condone the gross and patent injustice of imprisoning a man upon a constitutionally void conviction and sentence, upon the theory that he waived his rights by not speaking up in time, is to substitute diaphanous fiction for fact and to say that justice hangs by a gossamer strand, or indeed that it is only an illusion—a mirage in the distance.

It hardly needs to be said that we should not turn a deaf ear to the petitioner's complaint and close our eyes to the fact that his conviction and sentence are constitutionally void simply because he waited in prison more than 20 years to voice his protest.

In my view, the judgment should be reversed and this petition should be sustained. This does not mean that the petitioner must necessarily go free. For indictments can be returned and trials can be had by juries selected as the Constitution commands. Patton v. State of Mississippi, 332 U.S. 463, 68 S. Ct. 184, 187, 92 L. Ed. 76.

It should be noted in passing that the opinion of this Court in Doyle v. State, cited in the majority opinion, affirming the dismissal, without an evidentiary hearing, of a post-conviction petition containing substantially the same allegations as does the present petition, is directly contrary to the above-quoted November 3, 1967 opinion of the Supreme Court of Tennessee holding that an evidentiary hearing is required when such allegations are made in a post-conviction petition.

Supreme Court, U. S.
FILED
JUL 17 1972
JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. .....

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LEWIS S. TOLLETT, Warden,
Tennessee State Prison for Men
Nashville, Tennessee,

*Petitioner*,

*v.*

WILLIE LEE HENDERSON,

*Respondent*.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

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RESPONSE NOT PRINTED

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# SUPREME COURT OF THE UNITED STATES

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v.

WILLIE LEE HENDERSON,

*Respondent.*

---

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

The Petitioner, Lewis S. Tollett, Warden, Tennessee State Prison for Men, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on April 20, 1972.

## OPINION BELOW

The opinion of the Sixth Circuit, ... F.2d ..., not yet reported, is reproduced as Appendix A. The order of

the District Court of April 12, 1971, granting the relief sought, is attached as Appendix B.

## JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 20, 1972. This petition for certiorari is timely filed within ninety (90) days of that date. Jurisdiction is invoked under 28 U.S.C. §1254 (1).

## QUESTION PRESENTED

1. Did Mr. Henderson waive his rights to attack the racial composition of the grand jury which indicted him, by his failure and the failure of his retained counsel to object to the composition of the grand jury prior to entering a plea to the indictment?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

> §2241. Power to grant writ
>
> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district

courts and any circuit judge within their respective jurisdiction ....

"(c) The writ of habeas corpus shall not extend to a prisoner unless —

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States ..."

## STATEMENT OF THE CASE

On January 22, 1948, a Nashville, Tennessee, liquor store employee was shot and seriously wounded in an abortive hold-up attempt. Police arrested the petitioner, Willie Lee Henderson, a Negro, and two other men in connection with the crime. The three were charged with robbery and attempted murder. When the hold-up victim died several weeks later, first degree murder indictments were handed up against all three men by the Davidson County Grand Jury.

Mr. Henderson signed a confession acknowledging his participation in the robbery attempt and the shooting. Mr. Henderson was represented by retained counsel and pursuant to a plea bargain arranged by his attorney, Mr. Henderson entered a plea of guilty and was sentenced to a ninety-nine (99) year prison term. He was still serving that sentence at the time he sought federal habeas corpus relief.

Neither Henderson nor his counsel objected to the exclusion of Negroes from the Grand Jury which indicted him. Although Henderson sought habeas corpus relief in state and federal courts in 1964, he did not raise the systematic exclusion question at that time. Mr. Henderson filed a petition for habeas corpus relief in the state court in 1967, which was denied without a hearing. Upon

review of that decision, the Tennessee Supreme Court ordered that an evidentiary hearing be held on the issue of systematic exclusion of blacks from the grand jury. On remand, the Trial Court found that no pattern of systematic exclusion had been shown and again denied Mr. Henderson any relief. The Tennessee Court of Criminal Appeals affirmed by a divided vote based on what it found to be a waiver created by Mr. Henderson's failure to raise the claim of systematic exclusion before pleading to the indictment and by his plea of guilty itself. The Tennessee Supreme Court declined to review the decision.

Mr. Henderson, having exhausted his state remedies on the question, then sought federal habeas corpus relief in the District Court. His petition raised several grounds but the District Court properly considered only the matter of systematic exclusion of Negroes from the Davidson County Grand Jury. The District Court concluded that a pattern of systematic exclusion of Negroes from the Davidson County Grand Jury in 1948 had, in fact, been shown. It was also held that the petitioner had not waived his right to challenge the indictment handed up by such grand jury. Accordingly the District Court ordered petitioner's release. The United States Court of Appeals for the Sixth Circuit affirmed that decision.

## REASON FOR GRANTING THE WRIT

***May a black defendant who in 1948, with retained counsel, entered a plea of guilty to first degree murder, challenge the composition of the Grand Jury in 1971, or did he waive his right by failure to file a plea in abatement before entering a plea and thereafter entering a plea of guilty to the charge?***

The Tennessee Courts have held that unless the defendant objects by a motion or plea in abatement to the venire before he pleads to the indictment, he cannot thereafter avail himself of the claim that the venire was improperly composed. See *State ex rel Lawrence v. Henderson*, 433 S.W.2d 96, 101 (Tenn. Ct. of Crim. App. 1968) in cases cited therein; see also *State v. Cole*, 28 Tenn. 626; *McPigue v. State*, 63 Tenn. 313; *Turner v. State*, 89 Tenn. 547, 15 S.W. 838; *Ellis v. State*, 92 Tenn. 85, 20 S.W. 500.

Federal Rule of Criminal Procedure, Rule 12 (b) (2) and the notes of the Advisory Committee on Rules apparently reach the same results in the Federal Courts. Those notes are as follows:

"Note to Subdivision (b) (1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rule of Civil Procedure.)

"In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure.) Among the defenses and objections in this group are the following: illegal selection or organization of the grand jury, disqualifi-

cation of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc."

The Sixth Circuit Court of Appeals admits that the rule in Tennessee is as stated and that the federal rule is as stated. That Court further admits that the rule in the Sixth Circuit is as elsewhere, that a voluntary plea of guilty made by an accused while represented by competent counsel waives all non-jurisdictional defects and that the racial composition of a grand jury is non-jurisdiction in nature and subject to waiver. *Michener v. U. S.*, 170 F.2d 973 (8th Cir. 1948); *Hunt v. State of Georgia*, 445 F.2d 1228 (5th Cir. 1971); cf. *Colson v. Smith*, 438 F.2d 1075 (5th Cir. 1971).

This Court in *Parker v. North Carolina*, 397 U.S. 790, 25 L. Ed. 2d 785, 90 S. Ct. 1458, in considering the question raised here stated as follows:

"We also have before us the question whether the indictment to which Parker pleaded is invalid because members of his race were allegedly systematically excluded from the grand jury which returned the indictment. The North Carolina Court of Appeals refused to consider the claim since under North Carolina law an objection to the composition of the grand jury must be raised by motion to quash the indictment prior to the entry of the guilty plea. Because Parker had failed

to raise his objection in timely fashion, relief was unavailable. This state rule of practice would constitute an adequate state ground precluding our reaching the grand jury issue if this case were here on direct review. See *Fay v. Noia*, 372 U.S. 391, 428-429, 9 L. Ed. 2d 837, 862, 863, 83 S. Ct. 822 (1963). We are under similar constraint when asked to review a state court decision holding that the same rule of practice requires denial of collateral relief. *Ibid.* Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide."

The Honorable Frank Gray, Jr., United States District Judge, in his opinion seemed to rely heavily on the statement of the Honorable Charles Galbreath, Judge of the Court of Criminal Appeals of Tennessee, wherein he stated that, "[n]o lawyer in this state would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948 . . ." *State ex rel Henderson v. Russell*, 459 S.W.2d 176, 179 (Tenn. Ct. of Crim. App. 1970). The Sixth Circuit Court of Appeals also tended to give much weight to this statement in their opinion also. The facts do not support this statement. As this Court is well aware, *Strauder v. West Virginia*, 100 U.S. 303 (1880) and *Patton v. Mississippi*, 332 U.S. 463 (1947) had been decided by this Court but in addition, there was a highly publicized case heard by the Supreme Court in Nashville at the December Term of 1946 (*Kennedy v. State*, 186 Tenn. 310) wherein Mr. Justice Thurgood Marshall and others challenged the racial composition of the grand and petit juries in a case arising out of Maury County, Tennessee, at Columbia. Certiorari was denied by the United States Supreme Court and this opinion was designated for publication April 15, 1948.

Mr. Henderson also seems to rely heavily on the case of *Johnson v. Zerbst*, 304 U.S. 458, 82 L. Ed. 1461, 58 S. Ct. 1019, wherein the petitioner there was alleged to have waived his constitutional right to counsel. The Court in that case said that the petitioner made the decision alone apparently without sufficient knowledge of the consequences of his waiver. There is a considerable difference in a man waiving counsel and a man who has retained counsel waiving another right which he may have as in this case to attack the composition of the grand jury.

## CONCLUSION

The Sixth Circuit in this case held that, "Under the unique circumstances of this case we cannot find that his plea of guilty waived his right to challenge the grand jury selection process by means of federal habeas corpus," and in a sense seemed to say that even though Tennessee correctly applied their own law and that this is not contrary to the federal rules, that these circumstances warrant a new trial on behalf of Mr. Henderson.

If the circumstances in this case are unique enough for a new trial, what happens in a situation where a black defendant had Court-appointed counsel and entered a plea of not guilty in a Davidson County, Tennessee, case prior to 1955 or '60. Surely there could be no clear waiver presented and if this was not a case where Mr. Henderson waived his right to now attack the composition of the grand jury, then it is the opinion of this attorney that there is no black inmate in the prisons of Tennessee who was convicted in Davidson County prior to 1960 who would not deserve a new trial. Needless to say, this would create an unbearable situation in the criminal courts of this county.

The question presented is of sufficient importance for the Court to exercise its jurisdiction and issue a writ of certiorari to review the opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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# APPENDIX A

[fol. 1] NO. 71-1451

## UNITED STATES COURT OF APPEALS

## For the Sixth Circuit

WILLIE LEE HENDERSON,
*Petitioner-Appellee*,

v.

LEWIS S. TOLLETT, Warden,
*Respondent-Appellant*.

APPEAL from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed April 20, 1972.

Before: PHILLIPS, Chief Judge, and CELEBREZZE and MILLER, Circuit Judges.

CELEBREZZE, Circuit Judge. This is an appeal from a decision of the United States District Court for the Middle District of Tennessee, granting a petition for habeas corpus.

On January 22, 1948 a Nashville, Tenn. liquor store employee was shot and seriously wounded in an abortive hold-up attempt. Police arrested Petitioner, Willie Lee Henderson, a Negro and two other men, in connection with the crime. Three were charged with robbery and attempted murder. When the hold-up victim died several

weeks later, first degree murder indictments were handed up against all three men by the Davidson County Grand Jury.

Without seeking the advice of counsel on this matter, Petitioner signed a confession acknowledging his participation in the robbery attempt and the shooting. Although he initially wanted to plead not guilty Henderson was eventually persuaded by counsel retained by his mother, to [fol. 2] enter a guilty plea. He did so in March, 1948 and was sentenced to a ninety-nine year prison term pursuant to a plea bargain arranged by his attorney. He was still serving that sentence at the time he sought federal habeas corpus relief.

Neither Henderson nor his counsel objected to the exclusion of Negroes from the Grand Jury which indicted Petitioner. Although Henderson sought habeas corpus relief in state and federal courts in 1964 he did not raise the systematic exclusion question at that time.[1] Such claim was included in a 1967 state habeas corpus petition which was denied by the state trial court without a hearing. Upon review of that decision the Tennessee Supreme Court ordered that an evidentiary hearing be held on the issue.

---

[1] In those earlier pro se petitions he did claim that his confession had been coerced and that his plea of guilty was therefore involuntary. He also asserted that he had been denied the assistance of counsel. The District Court considered these claims and decided them adversely to the Petitioner on the merits. We affirmed. Henderson v. Henderson, 6th Cir. #17855 (1968), cert. denied 391 U.S. 927 (1968).

We note that although the involuntary plea and ineffective assistance of counsel claims would have relevance to this case they have not properly been raised by Petitioner in connection with his present application for relief. We note, too, that were these claims properly before us we could find them unavailable to support a finding in Petitioner's favor in light of the prior adverse adjudication. See Sanders v. United States, 373 U.S. 1, 15 (1963); 28 U.S.C. § 2244. The present posture of the case does not require us to rule on the matter of preclusion, however.

On remand the trial court found that no pattern of systematic exclusion had been shown and again denied Petitioner any relief. The Tennessee Court of Criminal Appeals affirmed by a divided vote. It based its decision entirely on what it found to be the waiver created by Petitioner's failure to raise the claim of systematic exclusion before pleading to the indictment and by his plea of guilty itself. The Tennessee Supreme Court declined to review the decision.

Henderson, having exhausted his state remedies on the question then sought federal habeas corpus relief in the District Court. His petition raised several grounds for relief, but the District Court properly considered only the matter of systematic exclusion of Negroes [fol. 3] from the Davidson County Grand Jury. It reviewed the testimony offered at the state evidentiary hearing and concluded that a pattern of systematic exclusion of Negroes from the Davidson County Grand Jury in 1948 had, in fact, been shown. It was also held that Petitioner had not waived his right to challenge the indictment handed up by such a grand jury. Accordingly, the District Court ordered Petitioner's release. This appeal followed.

For nearly a century it has been plain that "a criminal defendant is denied the equal protection of the laws guaranteed by the Fourteenth Amendment if he is indicted by a grand jury ... from which members of his race have been excluded because of their race." *Eubanks v. Louisiana*, 356 U.S. 584, 585 (1958); *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Patton v. Mississippi*, 332 U.S. 463 (1947). It is plain that the evidence in this case fully supports the District Court's finding that Negroes were systematically excluded from the Davidson County Grand Jury

at the time the indictment against Petitioner was handed up.[2] The Respondent does not contest the finding of impermissible exclusion on appeal; he bases the appeal entirely on the claim that Henderson waived any right to attack the indictment because he did not make his challenge before pleading to the charges and because he pled guilty to the indictment.

Tennessee courts have consistently ruled that a challenge to the composition of the grand jury venire
[fol. 4] must be made by motion or plea in abatement before any plea to the indictment is entered. Failure to make such a challenge waives any objection under Tennessee law. *See State ex rel Lawrence v. Henderson*, 433 S.W.2d 96, 101 (Tenn. Ct. Crim. App., 1968) and cases cited therein.

A "state court's finding of waiver" does not, however "bar independent determination of the question by the federal courts on habeas, for waiver affecting federal rights is a federal question." *Fay v. Noia*, 372 U.S. 391, 439 (1963). In making that independent determination the federal courts must apply the "classic" definition of waiver: Did the defendant's conduct amount to "an intentional relinquishment or abandonment of a known right or privilege."

---

[2] The evidence showed that no Negro had served on the Davidson County Grand Jury in the years prior to 1948 and that no Negro was to serve on that panel until 1953, when a single Negro was called to duty: this despite the fact that Negroes made up over 25% of Davidson County's population. An explanation for this startling disparity may be found in the evidence. Proof at the hearing showed that whenever a Negro citizen's name appeared in the venire list from which grand jurors were selected by the county judges, a "c" or "col" abbreviation was placed before his name; officials were thus provided with a simple means of determining which citizens might be appropriately "excused" from grand jury duty. It is apparent from the absence of any Negroes on the grand jury panels that the means were used and the impermissible end of exclusion accomplished.

*Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Fay v. Noia*, 372 U.S. 391, 439.

Respondent initially suggests that it is inappropriate to apply the "classic" definition here, apparently because he does not believe that the equal protection right in question warrants the scrupulous protection which the classic definition and the accompanying "presumption against waiver" would provide. *See Johnson v. Zerbst, supra*, 304 U.S. at 464.

Nothing in *Fay v. Noia* suggests that the Supreme Court intended to establish a hierachy of constitutional protections and limit the applicability of the classic definition of waiver to those rights occupying the highest positions. The decision speaks only of "waivers affecting federal rights," *Fay v. Noia, supra*, 373 U.S. at 439; it does not distinguish among those rights. Since that decision was handed down three Circuit Courts have been asked to decide whether a particular habeas petitioner's conduct constituted a waiver of his equal protection right to indictment by a grand jury from which members of his race have not been systematically excluded. Each Circuit has applied the *Johnson v. Zerbst* standard in answering that question. *McNeil v. State of North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964); *Wade v. Yeager*, 377 F.2d 841, 846 (3rd Cir. 1967) *cert. den.* 393 U.S. 893 (1968).[3] We see no justification whatever for applying a less rigorous standard here.

[3] In the years prior to the Supreme Court's decision in Fay v. Noia, both the Fourth and Fifth Circuits had apparently employed a test somewhat less rigorous than that of Johnson v. Zerbst, in determining whether or not a habeas petitioner had waived his right to challenge the grand jury selection process. See United States v. Brady, 133 F.2d 476 (4th Cir. 1943), cert.

(Continued on following page)

When the *Johnson v. Zerbst* standard is applied it becomes clear that Petitioner's failure to raise an objection to the grand jury selection process could not have been an intentional abandonment of a known right. Petitioner was himself unaware that he had any such right at the time of his plea. Given the fact that he was then twenty years old, had received less than a sixth grade education and was not informed of such right by counsel this lack of knowledge is hardly surprising. Waiver, if it is to be found here would have to be predicated upon the knowledge and conduct of Petitioner's retained counsel.

While *Fay v. Noia, supra*, indicated that "a choice made by counsel not participated in by the petitioner does not automatically bar relief," 372 U.S. at 439, that decision does not require that the criminal defendant be consulted in every situation before a valid waiver can be effected. Certainly such consultation would be useless where, as here, the Petitioner's "frame of reference could not have included any comprehension of the traditional constitutional rights incident to a fair trial." *Whitus v. Balkcom*, 333 F.2d 496, 503 (5th Cir. 1964), cert. den. 379 U.S. 931 (1964).

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(Continued from preceding page)

den. 319 U.S. 746 (1943); United States v. Harpole, 263 F.2d 71 (5th Cir. 1959) cert. den. 361 U.S. 838 (1959). The Fourth Circuit explicitly recognized that Fay v. Noia required a stricter definition of waiver in McNeil v. State of North Carolina, 368 F.2d at 316. The Fifth Circuit has implicitly reached the same result in its post Fay v. Noia cases, such as Cobb v. Balkcom, 339 F.2d 95 and Colson v. Smith, 438 F.2d 1038 (1971). See also, the discussion of the application of the Johnson v. Zerbst rule to grand jury challenges in the Fifth Circuit contained in Gordon v. Breazeale, 246 F. Supp. 2, 7 (N.D. Miss. 1965).

If the conduct of counsel is, by itself, to waive a constitutional right held by the defendant, however, it would seem that at a minimum counsel's actions should [fol. 6] involve "a deliberate choice of strategy" amounting to an intentional "bypassing" of state procedures. *Henry v. Mississippi*, 379 U.S. 443, 451 (1965); *Fay v. Noia*, *supra*, 372 U.S. at 438.

Any discussion of tactical calculation is clearly inappropriate here. Petitioner's counsel testified at the evidentiary hearing that he never thought of the "possibility" of objecting to the systematic exclusion of Negroes from the Davidson County Grand Jury. Judge Galbreath, concurring in the decision of the Tennessee Court of Criminal Appeals denying Petitioner relief, felt compelled to comment: "No lawyer in this state would ever have thought of objecting to the fact that Negroes did not serve on the grand jury in Tennessee in 1948." *State ex rel Henderson v. Russell*, 459 S.W.2d 176, 179 (Tenn. Ct. Crim. App. 1970). This statement from a Tennessee Appellate Judge makes all the more credible the claim that Petitioner's attorney was without knowledge of the right to challenge the indictment when he advised his client to plead to the charges without objection to the grand jury venire.

When neither attorney nor client have any knowledge whatever of the right assertedly waived, it is clear that the *Johnson v. Zerbst* standard for waiver has not been met. Such is the case here. Accordingly we hold that Petitioner's failure to object to the indictment returned by an all-white grand jury before entering a plea did not waive his right to challenge the composition of that grand jury in subsequent federal habeas proceedings.

It is suggested, however, that apart from the mere failure to challenge the grand jury composition Petitioner

also acted to affirmatively waive his right to make such challenge by pleading guilty to the indictment.

It is the rule in this Circuit, as elsewhere, that a voluntary plea of guilty made by an accused while represented by competent counsel, waives all non-jurisdictional[4] defects. *Austin v. Perini*, 434 F.2d 752 (6th Cir. 1970); *Reed v. Henderson*, 385 F.2d 995 (6th Cir. 1967); *Crockett v. Haskins*, 372 F.2d 475 (6th Cir. 1966); *Caldwell v. Maxwell*, 357 F.2d 646 (6th Cir. 1966);

[fol. 7]

But while there is merit to the general rule that a guilty plea in a state court waives a defendant's right to raise in the federal courts alleged nonjurisdictional defects, we must be wary of blindly applying this doctrine to every case involving such a plea. There is nothing inherent in the nature of a plea of guilty which ipso facto renders it a waiver of a defendant's constitutional claims. Rather, waiver is presumed because ordinarily

4 While the failure of an indictment to state an offense has been held jurisdictional, other defects in the grand jury process are non-jurisdictional in nature and subject to waiver. Michenel v. United States, 170 F.2d 973 (8th Cir. 1948). The Fifth Circuit has implicitly held that the precise sort of challenge undertaken in the present case deals with a non-jurisdictional defect since it has held the right waived by a guilty plea in a situation where the presumption of intentional abandonment (see text above) was apparently appropriate. See Hunt v. State of Georgia, 445 F.2d 1228 (5th Cir. 1971); cf. Colson v. Smith, 438 F.2d 1075 (5th Cir. 1971).

Similarly we do not believe that the effect of a guilty plea can be totally avoided in this case by calling the indictment here void rather than voidable. The Tennessee cases cited by the District Court do not seem to support this proposition, one which the Tennessee Court of Criminal Appeals necessarily rejected in affirming the denial of state habeas corpus relief to Petitioner. Declaring void any indictment prepared by an improperly constituted grand jury would, in any event, result in a dislocation of the criminal process entirely out of keeping with the harm done in the great majority of cases where a flaw far less dangerous to the integrity of the criminal process than racial exclusion has been found.

such a plea is an indication by the defendant that he has deliberately failed or refused to raise his claims by available state procedures; therefore, principles of comity and the interests of orderly federal-state relations require that he not be allowed to present these claims to the federal courts. *United States ex rel Rogers v. Warden of Attica State Prison*, 381 F.2d 209, 213 (2d Cir. 1967).

The rule set out in *Austin v. Perini*, *supra*, and innumerable other cases simply recognizes the fact that a voluntary guilty plea, entered upon the advice of competent counsel usually implies an intentional and knowing abandonment of rights. *United States v. Warden of Attica State Prison*, *supra*, (cf. the position of
[fol. 8] Wisdom, J. In *United States v. Lucia*, 423 F.2d 697 (5th Cir. en banc 1970) *cert. den.* 402 U.S. 943 (1971) reaffirming his own belief in the principles announced by him in an earlier disposition of that case, 416 F.2d 920, 923 (5th Cir. 1969)). This presumption should not be lightly set aside; but in those few situations where evidence suggests that the presumption is unreliable an inquiry must be made into all the underlying circumstances surrounding the asserted waiver.[5] Our own doubt that a

[5] Such flexibility is not barred by the Supreme Court's recent decisions in **Brady v. United States**, 397 U.S. 742 (1970); **McMann v. Richardson**, 397 U.S. 749 (1970), or **Parker v. North Carolina**, 397 U.S. 790 (1970) (cf. **North Carolina v. Alford**, 400 U.S. 25 (1970); **Austin v. Perini**, 434 F.2d 752 (6th Cir. 1970)). In those cases the Court considered whether inaccurate legal advice as to the admissibility of confessions and the constitutionality of a particular penalty scheme supplied sufficient evidence of involuntariness or unintelligence as to render invalid a defendant's plea of guilty. The Court decided that such evidence alone was insufficient to invalidate the plea, where the advice given by counsel "was within the range of competence demanded of attorneys in criminal cases." McMann v. Richardson, 397 U.S. at 771.

(Continued on following page)

Negro defendant would know of his right to challenge a racially exclusive grand jury selection process in the Tennessee of 1948, together with the suggestion of Judge Galbreath that members of the Bar would have been equally unaware of the right suggests that this is one of those rare cases where the value of the guilty plea as pre-
[fol. 9] sumptive evidence of waiver is minimal. The testimony of Petitioner's counsel as to his own unawareness of the right to challenge the grand jury selection process convinces us that the presumption bore no relation whatever to reality in this unusual situation. Courts have consistently recognized that where both petitioner and counsel are without knowledge[6] of a substantial

(Continued from preceding page)

That line of cases did not establish a new general test for examining conduct alleged to constitute a waiver of federal rights; in fact it reemphasized the importance of Johnson v. Zerbst, 304 U. S. 458, 464 (1938), as the governing authority on the subject. See Brady v. United States, 397 U. S. at 748 n. 6. It did not suggest that a valid guilty plea waived the right to challenge all pre-pleading defects when a defendant neither knew nor could have known of the right at the time he entered his plea. It did not deal with a situation in which counsel's advice was competent judged by the time and place at which it was given, but grossly inadequate in light of the clearly established constitutional law of the period.

The Brady line of cases dealt only with challenges to the guilty plea itself; no such challenge has been made here. For this reason alone we believe that Brady and its successors cannot govern our decision here. Given the uniqueness of the concerns which necessarily affect any evaluation of the validity of a guilty plea in our system (see Brady, 397 U. S. at 749-59; McMann, 397 U. S. at 774) the Brady line of cases cannot provide a useful model for the practical application of the Johnson v. Zerbst standards in general. See the excellent discussion of this point in United States v. Liguori, 430 F. 2d 842 (2d Cir. 1970); cf. Scogin v. United States, 446 F. 2d 416 (8th Cir. 1971); Bannister v. United States, 446 F. 2d 1250 (3d Cir. 1971).

[6] Conceivably the lack of knowledge here might be traced to incompetent counsel. Were we to so hold there would be no need to discard the presumptive value of the guilty plea since one of the conditions precedent to the creation of such presumption would not have been satisfied. Holding that Petitioner received ineffective assistance of counsel would be a diffi-

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constitutional right that right is not waived even by a guilty plea. *See United States v. Michael,*[7] 426 F.2d 1066 (7th Cir. 1970); *Scogin v. United States*, 446 F.2d 416 (8th Cir. 1971); *Bannister v. United States*, 446 F.2d 1250 (3d Cir. 1971); *United States v. Liguori*, 430 F.2d 842 (2d Cir. 1970) *cert. den.* 402 U.S. 990 (1971)). In each of the cases just cited defendants sought to raise [fol. 10) a right granted to persons in their situations by a decision of the Supreme Court handed down after they had entered guilty pleas to criminal charges. In each case the Court of Appeals involved held that a petitioner could not have knowingly relinquished a right of whose existence he was unaware at the time he was asked to plead. The Courts accordingly refused to find that any waiver had occurred despite the guilty pleas.

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(Continued from preceding page)

cult thing to do here, however, even were we completely free to do so (see n. 1 *supra*). It seems evident that Petitioner received the same advice on this point that he would have received from most other lawyers in Tennessee in 1948. The Fifth Circuit has held an attorney's failure to inform his client of the right to challenge an improperly selected grand jury to constitute ineffective assistance of counsel, **Windom v. Cook**, 423 F.2d 721 (5th Cir. 1970), but that decision apparently dealt with a more recent time when raising such a claim might be more clearly a part of counsel's duty even in the Southern states. We are not sure that a finding of ineffective assistance of counsel would be appropriate here, even were it clear that that issue was properly before us.

Whether Petitioner's lack of knowledge on the matter of the invalidity of the grand jury selection process resulted from incompetent counsel or simply from a too-long tolerated gap between the requirements of the Constitution and realities of Tennessee Criminal practice the result was the same: Petitioner was denied an opportunity to raise a claim which might effectively have barred his prosecution.

[7] In **United States v. Michael**, the Court of Appeals for the Seventh Circuit, in dealing with a waiver allegedly created by petitioner's failure to raise a self-incrimination defense unknown to him at the time he entered a guilty plea stated:

> [Petitioner's] failure to assert a defense unknown to him at the time he pleaded guilty was not such an "intentional relinquishment or abandonment of a known right or privilege" as to overcome the presumption against waiver of fundamental Constitutional rights. 426 F.2d 1067, 1069 (1970).

While we cannot term the right here a "new" one—to do so would ignore a line of cases stretching back to 1880—it is clear that the present Petitioner was as effectively and excusably ignorant of the right as if it had never been announced. Under the unique circumstances of this case we cannot find that his plea of guilty waived his right to challenge the grand jury selection process by means of federal habeas corpus. *See also Muniz v. Beto*, 434 F.2d 697 (5th Cir. 1970); *Ellzey v. Breazeale*, 277 F. Supp. 948 (S.D. Miss. 1967); *Gordon v. Breazeale*, 246 F. Supp. 2 (N.D. Miss. 1965).

Accordingly we affirm the District Court's decision ordering Petitioner's release. The State of course may seek re-indictment of Petitioner by a properly constituted grand jury. Such grand jury proceedings and the resulting trial, if any, should be commenced within a reasonable period after the entry of this judgment or other final determination of this matter. In the event of a conviction Petitioner must be credited with the time already served.

Affirmed.

## APPENDIX B

[fol. 1]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF TENNESSEE**
**NASHVILLE DIVISION**

WILLIE LEE HENDERSON

VS.

LEWIS S. TOLLETT, Warden,
Brushy Mountain State Prison

} Civil No. 5996

**ORDER**

(Filed April 12, 1971)

This proceeding involves a petition for the writ of habeas corpus. Petitioner is presently confined, in the custody of respondent, at the Brushy Mountain Prison, Petros, Tennessee, where he is serving a sentence of ninety-nine years which was imposed by the Criminal Court of Davidson County, Tennessee, following his plea of guilty, in 1948, to a charge of murder in the first degree. In his *pro se* petition, petitioner sets forth four grounds upon which he bases his claim that his present incarceration is illegal. With regard to the first three of his asserted grounds, petitioner makes no affirmative showing, nor does he otherwise indicate, that he has ever presented them for adjudication to the courts of Tennessee. Since a showing of exhaustion of available state remedies is required by 28 U.S.C. § 2254 before federal habeas corpus relief can issue, this court, by order entered

December 29, 1970, refused to take cognizance of petitioner's first three grounds for relief. As his fourth ground for relief, petitioner asserts that his [fol. 2] present confinement is illegal, because he was indicted by a grand jury from which members of his race (Negro) had been systematically excluded.

With regard to this fourth ground, the petition contains the required showing of exhaustion of available state remedies. Additionally, as was noted by this court in its order of December 29, 1970, this ground raises constitutional issues of considerable magnitude. Accordingly, the aforesaid order directed respondent to show cause why the writ should not issue. The directed response was subsequently forthcoming, and, no satisfactory cause to the contrary appearing therein, it was ordered that the writ issue and that petitioner be brought before this court at an appointed time for a hearing. The hearing was held as ordered, and, as a result thereof, the following have been established as the basic facts of the case.

Petitioner, a black youth, was indicted by the Davidson County Grand Jury in 1948 on a charge of murder in the first degree. Although roughly one fourth of the population of Davidson County in 1948 was composed of members of petitioner's race, no black people served on the grand jury which indicted him; no black people had ever served on a Davidson County Grand Jury prior to the time of his indictment; and no black people served on the Davidson County Grand Jury until well into the next decade following his indictment. What is more, whenever the name of a black citizen appeared on the venire lists from which members of the Davidson County Grand Jury were chosen at the time of petitioner's indictment, it was marked with either the designation "c" or the designation "col" to

signify that the bearer of the name was "colored." Petitioner was represented by counsel who failed [fol. 3] to object to the composition of the indicting grand jury, quite simply, because the possibility never occurred to him. For the same reason, he never apprised petitioner of the possibility of attacking his indictment on that ground, and petitioner himself, a twenty-year-old with less than a sixth grade education, never thought of the possibility on his own. Ultimately, petitioner pleaded guilty (he now claims as the result of coercion and trickery, but that is irrelevant in the present context) and was sentenced to serve a term of ninety-nine years in prison.

After serving some two decades in prison, petitioner collaterally attacked his sentence in a state habeas corpus proceeding on the ground that he had been indicted by a racially-exclusive grand jury. His petition was denied at the trial level without a hearing. Eventually, however, the Supreme Court of Tennessee reversed this denial and ordered that an evidentiary hearing be held on petitioner's allegations. Apparently petitioner was provided with court-appointed counsel who, in effect, elected to begin the proceeding *de novo* by filing a second and somewhat more sophisticated petition, based upon the same ground, in the Criminal Court of Davidson County (No. 4662) on January 12, 1968. A hearing was held on the new petition, and at that hearing all of the facts recited above were adduced. Nevertheless, the trial judge found as a matter of fact that there had been no systematic exclusion of Negroes from the grand jury which had indicted petitioner, and, accordingly, the petition was denied.

Petitioner appealed, and a divided Court of Criminal Appeals of Tennessee, with apparent reluctance, affirmed

the decision of the trial judge. The appellate court did not, however, affirm the trial judge's finding of fact that there had been no systematic exclusion of Negroes from the Davidson County Grand Jury in 1948. Rather, it based its decision on the ground that, regardless of [fol. 4] whether petitioner was correct or not in contending that members of his race had been systematically excluded from the grand jury which had indicted him,[1] he had waived all right to complain of the grand jury's composition, (a) because he had failed to raise that issue by means of the procedural devices available to him at the time of his indictment and conviction, and (b) because his plea of guilty had abrogated any defects which the indictment might have contained. *Henderson v. Russell*, No. 5996 (Ct. Crim. App. Tenn., filed July 6, 1970). This decision by the Court of Criminal Appeals of Tennessee became the final state court ruling in the case upon denial of certiorari by the Supreme Court of Tennessee. Finally, having thus exhausted his available state remedies, petitioner sought federal habeas corpus relief. It remains, then, to consider whether such relief shall be granted.

(I) The constitutional issue: indictment of a black man by a grand jury from which members of his race have been systematically excluded.

The unconstitutionality of racially-exclusive grand juries, insofar as their actions affect members of the excluded race, has been firmly established since at least as early as 1880. *Strauder v. West Virginia*, 100 U.S. 303 (1880). Neither an in-depth analysis of the facts of

[1] The clear implication of the three opinions rendered in the case is that the members of the Court of Criminal Appeals of Tennessee felt that petitioner's contention was correct.

the instant case nor a lengthy citation of authorities is required to support the proposition that petitioner's showing of the total absence of members of his race
[fol. 5] from the Davidson County Grand Jury in 1948 and prior years constitutes proof of a *prima facie* case of systematic exclusion of such persons, thereby casting the burden on respondent to prove to the contrary. *Whitus v. Georgia*, 385 U.S. 545 (1967). This burden respondent clearly has failed to sustain. Moreover, any rebuttal proof which respondent might have offered would have been essentially ineffective in the face of petitioner's showing that the names of black people were given distinguishing marks whenever they appeared in the venire lists from which Davidson County Grand Jurors were chosen at the time of his indictment, for it is obvious that such " ... marking of the jury ... [lists] with the letter "C" [or with the abbreviation "col"] to indicate persons of the Negro race constituted a purposeful discrimination which is unlawful under the Federal Constitution." *Bonds v. State*, 421 S.W.2d 87, 90 (S. Ct. Tenn. 1967). It is thus ineluctable that petitioner was indicted by an unconstitutionally-composed grand jury, and it is also ineluctable that such a body is legally not a grand jury at all.

(II) The waiver issue: effect of petitioner's failure to object, at the time of his indictment or shortly thereafter, to the racial composition of the grand jury which indicted him.

Respondent concedes—as it is apparent he must—that petitioner has proved everything necessary fully to support his contention that members of his race were systematically excluded from the grand jury which indicted him. He thus asserts " ... that the only [remaining] issue is whether

or not the petitioner has waived his rights to question the composition of the [indicting] grand jury ...," and he strenuously insists that petitioner has indeed [fol. 6] waived such rights. This court does not agree.

With all deference to what respondent refers to as a "long line of cases" in Tennessee which appear to hold otherwise, this court feels it is illogical to contend that either petitioner's failure timely to object to the composition of the indicting grand jury or his subsequent entry of a guilty plea constitutes a waiver, by operation of law, of his right to object to the composition of that grand jury at the present time. Such a contention, as pointed out by Judge Oliver in his well-reasoned and convincing dissent in *Henderson v. Russell*, *supra*, rests upon a confusion between an indictment which is merely technically defective and one—such as petitioner's—which is a complete nullity.[2] In the latter case, stated in the simplest of terms, there is no "defect" in the indictment to waive, for there is in fact no "indictment" to contain such a defect: instead, there is merely a sheet of paper, meeting, to be sure, the facial requisites of a valid indictment, but having in actuality no legal effect whatsoever. It is clear that any criminal prosecution brought incident to such an "indictment" is illegal and that a plea of guilty to such an "indictment" is of no binding effect, for such an "indictment" confers no subject-matter jurisdiction on the sentencing court. *State v. Hughes*, 371 S.W.2d 445 (S. Ct. Tenn. 1963); *Robinson v. City of Memphis*, 277 S.W.2d 341 (S. Ct. Tenn. 1955); and cases cited in *Henderson*

[2] Thus, for example, in the case of Bonds v. State, supra, an indictment rendered by a racially-exclusive grand jury in Williamson County " ... dismissed as void" by the Supreme Court of Tennessee (and this despite the fact that, strictly speaking, defendant's challenge to the racial composition of the indicting grand jury was not timely raised).

[fol. 7] *v. Russell*, *supra*, (Oliver, J., dissenting).

Respondent places great store in the fact that a defendant in federal court may, under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, waive the right to complain of the racial composition of the grand jury which indicted him if he fails to raise that issue at a specified stage in the proceeding. Indeed, the crux of his entire position with regard to waiver seems to be the proposition that if unconstitutionality of grand juries may be waived in federal court, then the same rule should apply to state court proceedings. His basic assumption is that, if petitioner had been indicted by a federal grand jury and sentenced by a federal judge, then he would now be precluded from objecting to the racial composition of the indicting grand jury. From this premise, respondent infers that the same result should be effected in the case at bar.

This court is not persuaded by respondent's argument and is of the opinion that it fails for at least three reasons: (1) his basic assumption is factually incorrect; (2) even if his basic assumption were true, a waiver under Rule 12 is not analogous, in terms of what is actually waived, to the waiver assertedly made by the instant petitioner; and (3) ignoring completely (1) and (2), *supra*, the case law is clear as to the test for waiver which this court must apply in the case at bar, and, applying that test, it is inescapable that petitioner has waived nothing. A brief amplification of the foregoing considerations is here in order.

(1) Rule 12(b)(2), Federal Rules of Criminal Procedure, provides that "[d]efenses and objections based on defects in the institution of the prosecution or in the indictment ..." must be raised before trial, otherwise they are waived.

[fol. 8] In his brief, respondent sets forth pertinent portions of the Notes of Advisory Committee on Rules to point out that "[i]llegal selection or organization of the grand jury" is one of the defenses or objections thus subject to waiver, and he cites several federal cases which refuse, on grounds of waiver under Rule 12, to permit the challenge of indictment by racially-exclusive grand juries to be raised.

Nevertheless, respondent's brief omits an important consideration, namely, the fact that Rule 12(b)(2) expressly provides that the defense of lack of jurisdiction is not waived by failure to raise it before trial. It is indeed difficult, if not impossible, to conceive how the rule could provide otherwise, for it is axiomatic in Anglo-American jurisprudence that one cannot waive lack of jurisdiction, even if one so wishes. And, as noted above, a void indictment, under the law of Tennessee, confers no subject-matter jurisdiction on the sentencing court. Hence, Rule 12, by its very language, would not necessitate a finding of waiver in the case at bar, even if it were applicable herein.

Further, Rule 12(b)(2) also provides that, in the case of those defenses and objections which are waived if not raised before trial, " ... the court for cause shown may grant relief from the waiver." Respondent has not apprised this court of any reason why a court before which an individual's conviction is attacked collaterally may not likewise grant relief from such waiver, upon a showing of good cause. In the instant case, any number of factors have been established which suffice to constitute such a showing. Thus, if petitioner were held, by operation of law, at some point to have waived his right to challenge the racial composition of the grand jury which indicted

[fol. 9] him, it is readily apparent that this court could appropriately grant relief from such waiver, even if Rule 12(b)(2) actually applied to the case at bar. It is clear from the foregoing considerations that respondent's basic premise is incorrect.

(2) Assuming, *arguendo*, that a waiver under Rule 12 were categorical and would admit of no exceptions, it would still avail respondent nothing to point to the situation in federal court and argue that the same considerations should apply in the case of the instant petitioner, for a waiver under Rule 12 is not analogous to the waiver assertedly made by this petitioner: what this petitioner has assertedly waived cannot be waived under Rule 12.

More specifically, this petitioner is attacking the racial composition of the grand jury which indicted him on the ground that that composition resulted from a selection process which denied him equal protection of the laws. Thus the part of the Constitution upon which the instant petition is based is the Equal Protection Clause of the Fourteenth Amendment, and the right which respondent contends petitioner is now precluded from asserting is the right to equal protection of the laws. The Equal Protection Clause is worded as follows: '[n]o *State* shall ... deny to any person within its jurisdiction the equal protection of the laws," (emphasis added) and it follows from this wording that, whatever may be the standard with which federal grand jury selection must comply, it is not the one set forth in the Equal Protection Clause of the Fourteenth Amendment,[3] for that clause " ... effects

[3] In actual effect, of course, the federal and the state standards are the same. Nevertheless, the rights which give rise to the respective standards are different: if a federal defendant complains of the racial composition of the grand jury which indicted him, he is in fact complaining that his

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[fol. 10] a prohibition only on the states," *Washington v. United States*, 401 F.2d 915, 922 (D.C. Cir. 1968), and is thus inapplicable to the Federal Government, the Federal Judiciary, and the Federal Rules of Criminal Procedure. The sole point which this court wishes to stress in the present context, however, is that, whatever it may be that a federal defendant waives under Rule 12-(b)(2), it is clearly not the right to complain of a denial of equal protection of the laws by virtue of racially-exclusive grand jury selection. It follows that the waiver provision of Rule 12 is necessarily not analogous to the waiver which respondent asserts was made by this petitioner: the practice in federal court has no bearing whatever on the issue presently before this court, and the cases cited by respondent are inapposite in the present context.

(3) Finally, ignoring the foregoing considerations completely, it is readily apparent from the cases that respondent's argument with respect to waiver is not well taken. "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default," *Labat v. Bennett*, 365 F.2d 698, 707 (5th Cir. 1966), certiorari denied 386 [fol. 11] U.S. 991 (1967), and the law is clear that "[a] procedural default, such as the one here in question, may not be regarded as a waiver unless it appears from the evidence that the default resulted from a

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Fifth Amendment rights have been violated, while when a state defendant makes the same charge, he is in fact complaining (as is this petitioner) of an abridgement of his Fourteenth Amendment rights. See e.g., Washington v. United States, infra. Thus, violation of the Equal Protection Clause of the Fourteenth Amendment is not a defense to a federal prosecution, at least insofar as is relevant here, and hence is not one of the matters that can be waived under Rule 12.

deliberate choice made by counsel and participated in by his client." *Wade v. Yeager*, 377 F.2d 841, 846 (3rd Cir. 1967), certiorari denied 393 U.S. 893 (1968). More specifically, as stated by the United States Supreme Court, "[t]he classic definition of waiver enunciated in *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 1466, 58 S. Ct. 1019, 146 ALR 357 ... furnishes the controlling standard.... [And] a state court's finding of waiver [does not] bar independent determination of the question by the federal courts on habeas [corpus], for waiver affecting federal rights is a federal question [citation omitted]." *Fay v. Noia*, 372 U.S. 391, 439 (1963). In short, regardless of whatever may be the procedural rule with respect to waiver in the criminal courts of Tennessee and regardless of whatever may be the federal practice in that regard, it is clear that the test for waiver which must be applied by this court in this case is the one expounded by the Supreme Court in the case of *Johnson v. Zerbst*, *supra*. It remains to examine that test in the light of the facts of the case at bar.

Under the holding in *Johnson v. Zerbst*, the "... 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and ... 'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver ... must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, conduct, and experience of the accused." *Johnson*, *supra*, at 464 (citations omitted).

[fol. 12] Viewing this petitioner in the light of his experience and background at the time of his indict-

ment and conviction, it is readily apparent that the presumption against waiver set forth in *Johnson v. Zerbst* works conclusively to preclude a finding of waiver in his case, for there is nothing in the record which rebuts such presumption in any manner. However, petitioner need not place his reliance upon the effect of the presumption alone, for the uncontroverted evidence adduced in this case obviates the need for such reliance: this evidence establishes as a matter of fact that petitioner was unaware of so much as the remotest possibility of attacking his indictment on the ground herein at issue at the time the indictment was returned, at the time of his guilty plea and sentence, or at any other time until shortly before he actually raised the matter in his state habeas corpus petition. Clearly, under the *Johnson v. Zerbst* standard, petitioner cannot be held to have waived something of which he was not even aware.

It might be contended that, since the possibility of attacking an indictment on the ground that it was rendered by a racially-exclusive grand jury has long been available, *Strauder, supra*, petitioner's counsel should be charged with knowledge of such possibility and that such knowledge should, in turn, be imputed to petitioner. Such an argument is clearly not well taken in light of the fact that "[n]o lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948...." *Henderson v. Russell, supra*, (Galbreath, Jr., concurring). What is more, petitioner's attorney stated in an affidavit executed in conjunction with petitioner's state court proceeding that, indeed, [fol. 13] the possibility of raising the equal protection objection never occurred to him and that, in consequence, he never mentioned such possibility to

petitioner. Given this latter fact, even if petitioner's counsel had been well aware of the possibility of attacking petitioner's indictment on equal protection grounds, but had, through either choice or negligence, failed to assert such grounds in his client's defense, his failure could not, on the facts of this case, be imputed to petitioner, because "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief." *Fay v. Noia*, *supra*, 439.

In substance, shorn of the extraneous trappings of legal fiction, the outcome of this case turns upon the answer to the following simple question: Can a twenty-year-old black defendant, who had less than a sixth-grade education when he was charged with murder in 1948, be held intentionally to have relinquished or abandoned a known right or privilege by virtue of his failure, without contrary advice of counsel, to assert in his own defense the proposition that his indictment was constitutionally void in the light of the Equal Protection Clause of the Fourteenth Amendment, when, in fact, "[n]o lawyer in this State" would have thought of asserting such a defense? This court holds that he cannot. *Labat v. Bennett*, *supra*; *Ellzey v. Breazeale*, 277 F. Supp. 948 (S.D. Miss. 1967); *Gordon v. Breazeale*, 246 F. Supp. 2 (N.D. Miss. 1965).

It follows that petitioner's indictment and all proceedings based thereupon are void and of no legal effect. In consequence, his present incarceration is repugnant to the Constitution of the United States. It is, accordingly, ORDERED that he be released forthwith from the custody of the respondent.

/s/ Frank Gray, Jr.
UNITED STATES DISTRICT JUDGE

NOV 30 1972
MICHAEL RODAK, JR., CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1972

No. ~~72-65~~ 72-95

LEWIS S. TOLLETT, Warden
Tennessee State Prison for Men
Nashville, Tennessee,
*Petitioner,*

vs.

WILLIE LEE HENDERSON,
*Respondent.*

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# In the Supreme Court of the United States

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No. 72-65

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*Respondent.*

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## Brief of the People of the State of California Amicus Curiae in Support of Petitioner

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### Interests of Amicus Curiae

The issue presented in this case, set forth by the State of Tennessee in its petition for writ of certiorari is as follows:

> "Did Mr. Henderson [a black defendant] waive his rights to attack the racial composition of the grand jury which indicted him by his failure and the failure of his retained counsel to object to the composition of the grand jury prior to entering a plea to the indictment."

California law, similar to that of Tennessee, requires that a challenge to the grand jury (or to the trial jury panel)

must be made before trial. *See, People v. Sirhan*, 7 Cal.3d 710, 751, 755 (1972).

We are interested in this case because resolution of the question of what constitutes deliberate by-pass sufficient to preclude consideration of an issue on federal habeas corpus will have a significant impact on the volume of litigation in the federal courts, on the states' vital interest in their valid procedural rules, and on their equally vital interest in the finality of criminal convictions following fair trials or voluntary pleas of guilty.[1] We are convinced that all of these interests will be served, and no valid interest of a state prisoner compromised, by a decision of this Court which defines deliberate by-pass to include failure to follow such valid state procedural rules for raising constitutional questions, without further inquiry into the motivation of competent counsel or the personal knowledge and waiver of the defendant.

## SUMMARY OF ARGUMENT

The decision below is erroneous because it applied the "classic" test of waiver set forth by this Court in *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938): "an intentional relinquishment or abandonment of a known right or privilege." Despite the fact that failure to challenge a grand jury indictment has no relation to the voluntariness or validity of the subsequent proceedings, in this case a guilty plea, or the competence of counsel's advice, the court below refused to establish a "hierarchy" of constitutional rights and limit the applicability of the classic definition of waiver. The court also refused to apply the reasoning of this Court's decision in *Henry v. Mississippi*, 379 U.S. 443, 451

1. For an example of the problems raised, see *Carmical v. Craven*, 457 F.2d 582 (9th Cir. 1972), *cert. denied* October 12, 1972, No. 71-1602.

(1965), where the conduct of counsel was held insufficient to waive a constitutional right, because it deemed counsel's actions herein not a deliberate choice of tactics. The court, in our view, overlooked the clear facts of the case—which were not that counsel was unaware of the right involved but that no lawyer in the state would have thought of objecting. Moreover, the court gave no recognition or consideration at all to the state's compelling interest in the finality of criminal convictions and the near impossibility of a fair inquiry into the motivation of competent counsel years after the event. Finally, the court gave little recognition to this Court's decision in *McMann v. Richardson*, 397 U.S. 759 (1970), which appears to be controlling here, and persuasive authority for the general proposition that where competent counsel may waive the constitutional right in issue as a matter of tactics, inquiry into his motivation should simply not be undertaken.

## ARGUMENT

**Failure by Competent Counsel to Make the Challenge to the Grand Jury at the Proper Time in Accordance With Valid State Procedural Rules Should Be Deemed a Deliberate By-Pass Precluding Federal Relief Without Further Inquiry Into the Motivation of Counsel of the Knowledge of the Defendant.**

In *Johnson v. Zerbst, supra*, and *Fay v. Noia*, 372 U.S. 391 (1963), this Court established the basic principle that the waiver of a constitutional right must be personal, knowing and intelligent in order to preclude review on federal habeas corpus. In *Fay v. Noia*, this Court distinguished between the independent state ground sufficient to preclude appellate review of state court decisions, and the deliberate by-pass or waiver sufficient to preclude review on federal habeas corpus. This Court did indicate, however, that failure to follow state procedural rules could constitute delib-

erate by-pass, implying that waiver by counsel might be sufficient in some cases. *Id.* at 424-425, 433, 430-439.

Subsequently in *Henry v. Mississippi*, 379 U.S. 443 (1965), this Court made it clear that a deliberate choice of trial tactics by counsel in failing to follow a valid state procedure (raising an objection to evidence) would preclude federal review, either direct or on habeas corpus. Although this Court found evidence in the case which suggested reasons for counsel's move, the case was sent back for a hearing on counsel's reasons.

Very recently, this Court has suggested that some choices by counsel would be considered deliberate by-pass without inquiry into motivation absent some extraordinary circumstances. In *McMann v. Richardson*, 397 U.S. 759, 768-769 (1970), this Court held that a counseled defendant was not entitled to a hearing on his allegation that his plea of guilty was motivated by a coerced confession. This Court considered his plea a "plain by-pass" of state remedies in regard to testing the confession and commented that whether it was intelligent depended on whether he was so incompetently represented by counsel he should be afforded another chance.

We submit that these cases establish that there are and should be different standards of determining whether state procedures have been deliberately by-passed, depending on the right involved, the procedural rule involved, the effect of the rule on the fairness of the proceedings, and whether or not the defendant was competently counseled. The decision below was erroneous because it gave no consideration to these factors and rigidly applied the *Johnson v. Zerbst* standard of waiver in an inappropriate situation.

In the case presently before this Court, a black defendant was indicted in 1948 for first degree murder by a grand jury from which, it was subsequently concluded, blacks had been systematically excluded. The defendant had confessed

to the crime charged. The defendant was represented by competent retained counsel and pursuant to a plea bargain entered a plea of guilty and was sentenced to 99 years in prison. The issue of systematic exclusion of blacks from the grand jury was not raised until 1967, when the defendant sought habeas corpus relief on that ground in the state courts. While the state trial court found no systematic exclusion, the appellate court denied relief on grounds the issue was waived by failing to raise it before pleading to the indictment. On habeas corpus in the federal courts, the district court found systematic exclusion and held that the right to challenge the indictment had not been waived.

The Court of Appeal affirmed. Although the Court of Appeal recognized that failure to challenge at the appropriate time waived the issue under Tennessee law, and properly applied federal law in determining whether the right had been waived, the standard it applied was the "classic" definition of waiver set forth in *Johnson v. Zerbst*, and *Fay v. Noia*: "Did the defendant's conduct amount to an intentional relinquishment or abandonment of a known right or privilege." The court rejected the state's suggestion that applying the "classic" standard was inappropriate because nothing in *Fay v. Noia* suggested that this Court meant to establish a "hierarchy" of constitutional rights and apply different standards to them.

The court also rejected the *Henry v. Mississippi* waiver by counsel because petitioner's counsel testified he never thought of the possibility of challenging the grand jury, and the concurring appellate judge commented that no lawyer in Tennessee would have thought of challenging the grand jury.

Finally, the court disposed of *McMann v. Richardson* by a casual reference in a footnote that flexibility in inquiry was not foreclosed. The "flexibility" utilized by the court

was to set aside the presumption that a voluntary guilty plea entered upon advice of competent counsel implies a knowing abandonment of rights where "evidence" suggests that the presumption is unreliable. The court found unreliability because of its own doubt that a Negro defendant in 1948 would know of the right to challenge the jury and because of the suggestion of the appellate judge that members of the bar would have been equally unaware of the right.

First, on facts alone the court's decision is erroneous. The suggestion was that no lawyer would have thought of doing so, not that lawyers were *unaware* of the right. More important, however, is the fact that the inquiry was made at all. *McMann* strongly suggests, if it does not hold, that there will be no further inquiry into motivation where a voluntary guilty plea is made by a defendant represented by competent counsel.

While we consider *McMann* completely disposes of this case because a plea of guilty was entered, we think the doctrine of deliberate by-pass should control whether the defendant pleads or goes to trial. On considerations outlined above, logic and common sense dictate that there should indeed be a "hierarchy" of rights requiring different standards of waiver. We submit that failure to object at the appropriate time to the composition of the grand jury or, in close analogy, to the jury panel should preclude relief without further inquiry into the knowledge or motivation of either the defendant or his counsel unless there is some tenable claim of incompetence.

The use of a knowing and intelligent waiver standard cannot logically or even usefully be extended to all trial decisions which involve constitutional rights; both the burden on the courts and the potential for disrupting the administration of justice are too great. The confrontation

of witnesses and the right to call witnesses are important constitutional rights. Counsel's decision in these matters must prevail, whether the defendant agrees or not, if the "right" to counsel is to have any content other than a lawyer standing by to obey his client's whims and suggestions, sound or not. Whether or not to object to the admission of evidence is a trial decision which should be made by counsel, and unless he is incompetent, his decision right or wrong should be binding on his client.

In a different class entirely are those basic rights accorded an accused which, by their nature can be given up or waived only by affirmative action. The right to be represented by counsel, the right to a jury trial and the right not to testify against himself are such rights. And even in the latter, an accused represented by competent counsel must be presumed to waive the right merely by the affirmative act of testifying.

If any criminal conviction is ever to become final, there are some rights which must be deemed waived by failure to exercise them, depending on the nature of the right at issue and the compelling state interest in the procedural rule involved. A right to challenge the grand jury is an important constitutional right, but affirmative action is required to exercise it.[2] In the normal course of an indictment and trial no action whatever is required if the decision of counsel is to proceed without making the challenge. There are, of course, two aspects to this right, one is the right of the defendant not to have his race purposely excluded from the grand jury which indicts him. The other is the right of the excluded group to serve. The latter interest is protected by the right of the excluded group to challenge the exclusion by independent action. The right

2. Similar considerations apply to the requirement for challenging the jury panel before the jury is sworn.

of the defendant is amply protected by requiring the challenge to be made before trial. Once he is convicted by a properly constituted jury or enters a plea of guilty, permitting a belated attack on the composition of the grand jury is an exercise in futility. Requiring counsel in a collateral attack long after the event to justify his failure to make the challenge invites either challenges counsel considers useless because serving only the cause of delay, or the dubious tactic of failing to make the challenge the first time to give his client the benefit of a second trial. We think it reasonable to presume that any competent lawyer is *aware* of the right to challenge grand juries or petit jury panels on the grounds of racial exclusion. We submit that counsel's reasons for not making the challenge should not be subject to later inquiry in the absence of a tenable claim of incompetency.

We point out that the constitutional right in question, while important does not go to the fairness of the trial or the voluntariness of a guilty plea. Permitting an untimely challenge subverts the obvious interest of the state in resolving such issues before trial and their compelling interest in the finality of convictions which were obtained in completely fair proceedings with the defendant protected by competent counsel.

While the Court has not addressed itself to this question since *Fay v. Noia, supra,* earlier cases both explicitly and implicitly required a timely challenge before the issue would be considered. In *United States v. Gale,* 109 U.S. 65 (1883), the defendants challenged the statute disqualifying as grand jurors those who voluntarily took part in the rebellion. The Court did not reach the question,[8] because it held that by pleading not guilty and going to trial without

8. The court implied, however, that the statute was unconstitutional because it would exclude most whites.

objection, such objection was waived. *See also, Reece v. Georgia*, 350 U.S. 85, 87 (1955); *Carter v. Texas*, 177 U.S. 442 (1900). *Cf., Frazier v. United States*, 335 U.S. 497, 512-514 (1948) (challenge to trial jurors); *Fay v. New York*, 332 U.S. 261 (1947) (challenge to jury panel). In *Fay* this Court noted that if the challenge was good, all convictions by special juries "would be set aside *if the question had been properly raised at or before trial.*" *Id.*, at 266 (emphasis added). We submit that these cases should be followed, and that consideration of the right involved here requires a different standard of waiver than the "classic" standard of *Johnson v. Zerbst.*

## CONCLUSION

Because of the compelling interests of the states in their valid procedural rules and the finality of their fair criminal convictions, and because no valid interest of the accused is served by subverting them, we respectfully submit that the judgment below was erroneous. This Court should hold that failure to raise the issue at the appropriate time with full opportunity to do so constitutes deliberate by-pass which preclude relief on federal habeas corpus without further inquiry into the motivation of counsel.

Dated: November 29, 1972

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DEC 7 1972

MICHAEL RODAK, JR., CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-95

LEWIS S. TOLLETT, Warden,
Tennessee State Prison,
Petitioner,

vs.

WILLIE LEE HENDERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

## BRIEF FOR THE PETITIONER

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IN THE

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No. 72-95

LEWIS S. TOLLETT, Warden,
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vs.

WILLIE LEE HENDERSON,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Sixth Circuit

## BRIEF FOR THE PETITIONER

### OPINIONS BELOW

The opinion of the Court of Appeals (Pet.Cert. 1a) is reported at 459 F. 2d 237 (6th Cir. 1972) and the District Court opinion (Pet. Cert. 13a; App. A. 21) is reported at 342 F. Supp. 113 (M.D. Tenn. 1971).

### JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered April 20, 1972. The petition for certiorari was timely filed July 17, 1972. Jurisdiction is invoked under 28 U.S.C. §1254 (1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws."

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

> §2241. Power to grant writ
>
> "(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .
>
> "(c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> "(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

## QUESTION PRESENTED

***Whether the Respondent Waived His Right to Bring a Federal Habeas Corpus Action in 1970 Questioning the Racial Composition of the Grand Jury Which Indicted Him When He Entered a Guilty Plea to the Offense Upon the Advice of Retained Counsel in 1948.***

## STATEMENT OF THE CASE

Defendant and two others were indicted February 13, 1948, in Davidson County (Nashville), Tennessee (A. 131-A. 133). The indictment charged them with murder in the first degree by unlawfully inflicting wounds on William H. Cotter on January 22, 1948 (A. 132), which wounds caused him to linger, languish and die February 12, 1948 (A. 132).[1]

Mr. Henderson signed a confession acknowledging his participation in the robbery attempt (Pet. Cert. 2a).

On the advice of retained counsel, he entered a plea of guilty in exchange for a sentence of 99 years in the state penitentiary.[2]

### *State Post-Conviction Proceedings*

In January, 1968, Mr. Henderson, a Negro, filed a state habeas corpus petition (A. 45) alleging, *inter alia*, systematic exclusion of members of his race from the Davidson County grand jury. (A. 45-46). An evidentiary hearing was eventually held on this petition in state court. (A. 80-A. 125). The proof showed that the first black man to serve as a grand juror in Nashville was Dr. H. H. Walker, appointed April 16, 1953. (A. 102, A. 104, A. 116, A. 123, A. 142).

---

[1] The deceased was a liquor store employee who was seriously shot in the abortive hold-up attempt. He died after languishing in pain for twenty-one days (A. 131-A. 133) (Pet. Cert. 1a).

[2] The death penalty was frequently used in 1948 in Tennessee. From 1946 to 1949 there were 16 executions carried out at the Tennessee State Prison. Four other condemned men had their sentences commuted and one was killed attempting to escape. Source: Tennessee Prison records on condemned men, 1916 to date.

The state trial judge denied relief on the question of exclusion of blacks (A. 63-A. 65) and the Tennessee Court of Criminal Appeals affirmed. (A. 143-A. 169). The Tennessee Supreme Court denied certiorari. (A. 143).

*Federal Post-Conviction Proceedings*

Mr. Henderson then filed a petition for a writ of habeas corpus in Federal Court in Nashville, alleging, *inter alia*, that Negroes were systematically excluded from the grand jury which indicted him in 1948.

The United States District Court, Honorable Frank Gray, Jr., relying on the records filed of the state proceedings[3] (A. 37-A. 169), held that there was exclusion of Mr. Henderson's race from the grand jury because no Negro so served "until some years after petitioner was indicted, despite the fact that roughly one quarter of the population . . . were members of that race", and because the venire was in 1948 "marked with the designations 'c' or 'col.' for 'colored'." (A. 19). Judge Gray felt as a matter of law this showed systematic exclusion of blacks. He also felt there was no waiver by the guilty plea since neither petitioner nor his counsel[4] would have thought to challenge the composition of the grand jury in 1948.

The District Judge quoted from Judge Galbreath of the Tennessee Court of Criminal Appeals, who had remarked,

---

[3] 28 U.S.C. § 2247 (1966) provides: "[on] application for a writ of habeas corpus, documentary evidence, transcripts of proceedings upon arraignment, plea and sentence and a transcript of the oral testimony introduced on any previous similar application by or in behalf of the same petitioner, shall be admissible in evidence."

[4] The attorney hired for Mr. Henderson in the 1948 proceeding filed an affidavit (A. 95-A. 96) in the 1968 state proceeding in which he stated that the exclusion of Negroes from the grand jury issue was never discussed with Mr. Henderson.

"no lawyer in the State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948 . . ." (A. 32) (A. 149).

The State's appeal to the Sixth Circuit was unsuccessful. In an opinion by Judge Celebrezze, the court also rejected the State's theory of waiver. (Pet. Cert. 1a-12a).

This Court granted certiorari in this case on October 16, 1972. Certiorari was granted a week earlier in another case involving waiver by a federal guilty plea.[5]

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[5] **Clifford H. Davis v. United States**, No. 71-6481, **certiorari granted** — U.S. — (October 10, 1972). Mr. Melvin Wulf of the ACLU is now acting as counsel for Mr. Davis. The Clerk advises that **Davis** and this case will probably be heard together.

## SUMMARY OF ARGUMENT

The Nashville grand jury which indicted Mr. Henderson in 1948 had its first Negro member in 1953. This complied with then-applicable constitutional standards which prohibited only purposeful, deliberate exclusion because of race. Given the social climate in the South in 1948, a black on the grand jury would have been purposely put there because of his race. In reality, this Court should recognize the transformation in the law since 1948 of the concept of what state action amounts to systematic exclusion from jury service.

It was proper that the State require a challenge to the venire to be made prior to a plea to the merits. The federal courts have required this also. **Shotwell v. United States**, 371 U.S. 341 (1963).

A plea of guilty on advice of counsel waives the right to later challenge the grand jury. Mr. Henderson's attorney saved him from the electric chair by his negotiated plea. Others, including Mr. Justice Marshall, had challenged the grand jury venire in a celebrated Tennessee case without success. This Court had denied certiorari. Mr. Henderson actually benefited by not raising the grand jury question because this would have injected race into the case. He was guilty by his own admission, and the police had his signed confession. At the most, the issue raised in this case is harmless error.

If this Court gives Henderson the relief he requests thousands of other convicted defendants, similarly situated, will be released, unless the relief granted is prospective only. The State has a legitimate interest in the finality of its judgments, particularly where the collateral attack is on a matter extraneous to the guilt or innocence of the defendant.

## ARGUMENT

### 1. Blacks Were Not Systematically Excluded From the Nashville Grand Jury as That Term Was Understood in 1948.

The lower federal courts cite **Strauder v. West Virginia**, 100 U.S. 303 (1880), for the proposition that the States have been under a constitutional mandate since 1880 not to exclude Negroes from juries. **Virginia v. Rives**, 100 U.S. 313 (1880), decided the same day as **Strauder**, defined exclusion of Negroes from the grand jury in terms of laws prohibiting grand jury service by blacks merely because they were black.

Justice Strong for the majority said:

> "The assertions in the petition for removal, that the grand jury by which the petitioners were indicted, as well as the jury summoned to try them, were composed wholly of the white race, and that their race had never been allowed to serve as jurors in the County of Patrick in any case in which a colored man was interested, fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected.
>
> "Nor did the refusal of the court and of the counsel for the prosecution to allow a modification of the venire, by which one third of the jury, or a portion of it, should be composed of persons of the petitioners' own race, amount to any denial of a right secured to them by any law providing for the equal civil rights of citizens of the United States. The privilege

for which they moved, and which they also asked from the prosecution, was not a right given or secured to them or to any person, by the law of the State, or by any Act of Congress, or by the 14th Amendment of the Constitution. It is a right to which every colored man is entitled, that, in the selection of jurors to pass upon his life, liberty or property, there shall be no exclusion of his race, and no discrimination against them because of their color. But this is a different thing from the right which it is asserted was denied to the petitioners by the State Court, viz.: a right to have the jury composed in part of colored men. A mixed jury in a particular case is not essential to the equal protection of the laws, and the right to it is not given by any law of Virginia, or by any federal statute. It is not, therefore, guaranteed by the 14th Amendment, or within the purview of section 641." 100 U.S. at 322-323.

Justice Field, concurring, said:

"The denial of rights or the inability to enforce them, to which the section refers, is, in my opinion, such as arises from legislative action of the State, as for example, an Act excluding colored persons from being witnesses, making contracts, acquiring property, and the like. With respect to obstacles to the enjoyment of rights arising from other causes, persons of the colored race must take their chances of removing or providing against them with the rest of the community." 100 U.S. at 333.

Further:

"The application to the state court, upon the refusal of which the petition was presented, was for a venire composed of one third of their race—a proceeding wholly inadmissible in any jury system which obtains in the several States.

"From the return of the District Judge, it would seem that in his judgment the presence of persons of the colored race on the jury is essential to secure to them the 'equal protection of the laws'; but how this conclusion is reached is not apparent, except upon the general theory that such protection can only be afforded to parties when persons of the class to which they belong are allowed to sit on their juries. The correctness of this theory is contradicted by every day's experience. Women are not allowed to sit on juries; are they thereby denied the equal protection of the laws? Foreigners resident in the country are not permitted to act as jurors, yet they are protected in their rights equally with citizens. Persons over sixty years of age in Virginia are disqualified as jurors, yet no one will pretend that they do not enjoy the equal protection of the laws. If, when a colored person is indicted for a criminal offense, it is essential, to secure to him the equal protection of the laws, that persons of his race should be on the jury by which he is tried, it would seem that the presence of such persons on the Bench should be equally essential where the court consists of more than one judge; and that if it should consist of only a single judge, such protection would be impossible. To such an absurd result does the doctrine lead, which the Circuit Court announced as controlling its action." 100 U.S. at 335.

Before the murder in this case took place, **Kennedy v. State**, 186 Tenn. 310, 210 S.W. 2d 132 (1948), **certiorari denied** 333 U.S. 846 (1948), was decided. It stemmed from a prosecution for assault to commit murder. No Negroes had ever served on the Columbia, Tennessee grand or petit jury which convicted the Defendant. Mr. Justice Marshall, as one of the defense attorneys, lost his bid to show that blacks had been "systematically

excluded" as that term was understood at that time. The Tennessee Supreme Court said in **Kennedy**:

> "It is next insisted that the court erred in not holding that the defendant was discriminated against by the exclusion of Negroes from the grand jury.
>
> "On the hearing of the plea in abatement, the defendant introduced a number of witnesses whose testimony is that in their memory and for the last fifty years, no Negro had served on either the grand or petit jury in Maury County. The State's evidence showed that Maury County operated under a jury commission law; that the jury commissioners for the county met in July, 1944, and that they then filled the jury box by taking names from the 1943 tax books; and that these tax books contained no identifying symbols whereby the race of any taxpayer might be known. The evidence further showed that at the February 1946 term of court, at which the defendant was indicted, there was drawn from the jury box a list of one hundred and nine names to be summoned for jury service at that term of court. Of these one hundred and nine names so drawn, ten are shown to belong to the colored race. The record discloses that two of those so drawn of the colored race had died in the interim between July, 1944, when their names were put in the box, and the date of their being summoned for jury service; that one had removed from Maury County; and that two were actually summoned and excused at their own request. The record fails to disclose what became of the other five.
>
> "The State concedes that a presumption of discrimination can arise from a showing that no Negroes have either been summoned for jury service or have served on grand juries for so long a period of time as to give rise to the belief that the failure is deliberate rather

than accidental, but the State insists that such a presumption must yield to the undisputed facts when the question of discrimination is raised. There is no contention made of disproportionate representation of the Negro race on these panels, but the claim made is that of an utter absence of such representation.

"In **Norris v. Alabama**, 294 U. S. 587, 55 S. Ct. 579, 79 L. Ed. 1074, 1077, the evidence showed an apparent tampering with the list from which the jury had been selected so as to evidently substitute the names of several Negroes upon such list for members of the white race. In that case the excerpt relied upon by the defendant shows that no names of Negroes were placed on the jury roll. In the present case the testimony shows that the names of ten Negroes were placed on the jury list.

"In **Akins v. Texas**, 325 U.S. 398, 65 S.Ct. 1276, 89 L. Ed. 1692, it was held that where the jury commissioners placed the name of one Negro on a panel of sixteen from which the grand jury should be drawn, this fact evidenced an intent not to discriminate against members of the colored race.

"It should be borne in mind that members of the Negro race have no constitutional right to trial by a mixed racial jury. All that they have is a right that their race shall not be discriminated against in the selection and drawing of grand juries. The testimony of the jury commissioners is to the effect that when they placed the names of seven hundred and fifty or more taxpayers in the jury box for subsequent drawing, they were not aware as to the race of a great many of the persons whom they placed therein, but undertook to select a proportionate number of such persons from the various civil districts of the county without regard to their race. That this must be true

is evidenced by other testimony in the record. A Negro teacher called by the defendant testified that he was summoned for jury duty at a time previous to the impanelment of the grand jury that indicted the defendant and was excused from jury service at his own request. The evidence further shows that at the November term 1946, at which defendant was tried, one Negro appeared for jury service and was present awaiting such until the entire panel of some fifteen members was excused by the trial judge. The evidence also shows that one member of the colored race, Henry McGlothlin, was on a list of jurors drawn from the jury box in drawing a panel to select the petit jury for the trial of this case. The proof shows that these names which were drawn from the box were placed therein by the jury commission in July, 1944, or more than a year and a half before the commission of the alleged crime in this case." 186 Tenn. at 316-318, 210 S.W. 2d at 134-135.

A similar challenge mounted by Henderson's attorney so soon after the Kennedy decision would have proved to be an exercise in futility. As one commentator pointed out:

"It may be felt that such an objection would stir up racial feeling against the defendant, thereby damaging his chances for acquittal or a lighter sentence. Or perhaps the defense believes that it makes no difference to the outcome of the case whether or not there is jury exclusion, and that the trial should not be prolonged by a 'mere technical objection'."

Note, 72 Yale L.J. 559, 565 (1963.)

Mr. Henderson is black. The deceased was white. There was no reason for his attorney, knowing the police had a confession, to raise the racial issue in these circumstances. The duty of counsel in this case was to save the

life of his client by keeping him from being electrocuted, which was a frequent occurrence in Tennessee at that time.

While it would be easy now, with twenty-four years hindsight, to second guess defense counsel, it would have been a mistake in trial tactics had the defendant injected the racial issue. Since for the purpose of this proceeding, we assume the defendant was guilty because he entered a plea of guilty and because he confessed, the most that would have been accomplished by successfully raising the systematic exclusion question would be a new indictment. This is unlike **Kennedy** where the plea was not guilty and prevailing on the exclusion issue would have meant a new trial.

It seems hypocritical to imply in 1972 that the law has been fixed and immutable since **Strauder**. In 1948, Nashville was in a position similar to that of the other southern states. As required by **Strauder** and **Virginia v. Rives**, *supra*, blacks were not kept off grand juries because of their race. If a black had been on a grand jury in Tennessee in the 1940's, given the social climate of the times, he probably would have been chosen **because** of his race to fill some sort of quota. This is perhaps the reason Dr. H. H. Walker was chosen as the first black grand juror in 1953.

The petitioner is not attempting to justify grand jury practices in the South in 1948, but 1948 procedures should not be tested by what we now understand is a constitutionally adequate grand jury. Tennessee's practice in 1948 met the constitutional standards of 1948 and should be accorded that respect.

A fifteen year old boy was recently sentenced to death in Arkansas. **State v. Joe Newton Kagebein**, Cir. Ct. of Arkansas Co., So. Dist., **pending on appeal** Arkansas Supreme Court, No. 5665. Who is to say, 24 years from now,

an "enlightened" society will not consider the exclusion of young people from grand juries as constitutionally infirm as the exclusion of any other minority? See **Trop v. Dulles**, 356 U.S. 86, 100, speaking of "the evolving standards of decency that mark the progress of a maturing society." See also, **Furman v. Georgia**, 408 U.S. 238 (1972).

**2. The State had a valid interest in requiring that a defendant raise any objections to the racial composition of the grand jury before entering his plea to the indictment.**

The Tennessee courts have held that unless the defendant objects by a motion or plea in abatement to the venire before he pleads to the indictment, he cannot thereafter avail himself of the claim that the venire was improperly composed. See **State ex rel. Lawrence v. Henderson**, 1 Tenn. Crim. App. 199, 433 S.W.2d 96 (1968), and cases cited therein. See also **State v. Cole**, 28 Tenn. 626 (1849); **McPigue v. State**, 63 Tenn. 313 (1874); **Turner v. State**, 89 Tenn. 547, 15 S.W. 838 (1891); and **Ellis v. State**, 92 Tenn. 85, 20 S.W. 500 (1892).

Federal Rule of Criminal Procedure, Rule 12(b)(2)[6] and the notes of the Advisory Committee on Rules ap-

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[6] The pertinent provisions of Rule 12 are as follows:

* * * * * * * *

"(b) **The Motion Raising Defenses and Objections.**

* * * * * * * *

**(2) Defenses and Objections Which Must Be Raised:** Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

parently reach the same results in the Federal Courts. Those notes are as follows:

"Note to Subdivision (b) (1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rule of Civil Procedure.)

"In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure.) Among the defenses and objections in this group are the following: illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc."

The Sixth Circuit admits the rule in Tennessee is as stated and the federal rule is as stated. That Court further admits that the rule in the Sixth Circuit is as elsewhere, that a voluntary plea of guilty made by an

accused while represented by competent counsel waives all non-jurisdictional defects and that the racial composition of a grand jury is non-jurisdiction in nature and subject to waiver. **Michener v. United States**, 170 F. 2d 973 (8th Cir. 1948), and **Hunt v. State of Georgia**, 445 F. 2d 1228 (5th Cir. 1971).

In promulgating Rule 12, this Court provided that objections based on defects in the institution of the prosecution or in the indictment or information must be raised by pretrial motion or they are waived. Exceptions are provided as to jurisdictional defects and the failure of the indictment on its face to charge the defendant with the commission of an offense.

In **Shotwell v. United States**, 371 U.S. 341, reh. den., 372 U.S. 950 (1963), it was held that under Rule 12(b)(2) a federal criminal defendant who failed to object to alleged defects in the composition of the grand and petit juries before trial waived such objections. In **Shotwell**, the complaints concerning jury composition were that the jury commissioner delegated his selection duties to one of his private employees, that volunteers were permitted to serve on the juries, and that the clerk failed to employ a method of selection designed to secure a cross-section of the population. Portions of that opinion are here quoted:

> "We think, as the two lower courts did, that petitioners have lost these objections by years of inaction. Rule 12(b)(2) of the Federal Rules of Criminal Procedure, 18 U.S.C. provides: 'Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. * * * Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from

the waiver.' Petitioners concede, as they must (emphasis supplied), that this Rule applies to their objection to the grand jury array, but deny that it applies to their objection to the petit jury array. On the latter point we do not agree. In **Frazier v. United States**, 335 U.S. 497, 503, this court stated that a challenge to the method of selecting the petit jury panel comes too late when not made before trial. And the lower federal courts have uniformly held that an objection to the petit jury array is not timely if it is first raised after verdict. See e.g., **Hanratty v. United States**, 5 Cir., 218 F.2d 358, 359, **cert. denied**, 349 U.S. 928; **United States v. Klock**, 2 Cir., 210 F.2d 217, 220; **Higgins v. United States**, 81 U.S. App. D.C. 371, 160 F.2d 222, 223, **cert. denied**, 331 U. S. 822; **United States v. Peterson**, D.C., 24 F.Supp. 470.

"Petitioners have not advanced any reasons for overturning this settled course of decision. Rather, they argue that when public officials violate constitutional rights by actions whose illegality is not readily noticeable by the litigants or their counsel, sufficient cause has been shown to warrant relief from application of the Rule. **Ballard v. United States**, 329 U.S. 187, is said to stand for the broad proposition that technical rules of procedure do not prevent this Court from considering the merits of a basic challenge to the method of jury selection.

"In the circumstances of this case, petitioner's contentions are without foundation. In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. In-

quiry as to the system employed could have been made at any time. Indeed, the acceptance of volunteers for the juries had received publicity in the newspapers, and their presence on the petit jury could have been ascertained at the time it was constituted. And **Ballard** lends no support to petitioners' position, for in that case the challenge to the jury panel had been timely made and preserved. See 329 U.S., at 190.

"Finally, both courts below have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice. In **Ballard** it was said (at p. 195), that 'reversible error does not depend on a showing of prejudice in an individual case.' However, where as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of that Rule.

"We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts' holding that the objection has been lost." 371 U.S. at 362-364.

Since the decision in **Shotwell**, the Fifth Circuit has held that where such objections are not made prior to trial or plea of guilty, they are waived. **Pinkney v. United States**, 380 F. 2d 882 (5 Cir. 1967); **Jackson v. United States**, 394 F. 2d 114 (5 Cir. 1968); **Brooks v. United States**, 416 F. 2d 1044 (5 Cir. 1969); **Bustillo v. United States**, 421 F. 2d 131 (5 Cir. 1970) and **Throgmartin v. United States**, 424 F. 2d 630 (5 Cir. 1970). Contra, **Fernandez v. Mier**, 408 F. 2d 974 (9 Cir. 1969).

**3. Mr. Henderson waived his right to challenge the Grand Jury by pleading guilty.**

When Mr. Henderson entered his guilty plea, he confessed in open court that he and his associates, while robbing a liquor store, shot Mr. Cotter, who died twenty-one days later. The language of **Johnson v. Zerbst**, 304 U.S. 458, 464 (1938), speaking of waiver in the context of "an intentional relinquishment or abandonment of a known right or privilege" is inapplicable here. **Fay v. Noia**, 372 U.S. 391, 399 (1963), said "[a] choice made by counsel not participated in by the petitioner does not automatically bar relief," leaving the question to be decided on a case by case basis. **Henry v. Mississippi**, 379 U.S. 443 (1965) made clear the implication in **Fay** that some decisions made by counsel which entail the waiver of a constitutional right may be made by counsel without consultation with the accused. This Court in **Henry** said, "where the circumstances are exceptional," 379 U.S. at 451, the defendant will not be precluded from asserting constitutional claims. The implication is that the accused may be bound by his attorney where the circumstances are not exceptional. **Henry** requires the courts to determine whether the circumstances of the case before them are exceptional enough to invalidate the waiver of constitutional claims made in good faith by retained counsel.[1] Accord, **Murch v. Mottram**, 41 U.S.L.W. 3250 (U.S. Nov. 6, 1972) (holding defendant bound by his attorney's actions and quoting language used by the Fourth Circuit that "there are a great many instances where a party must be bound by a mistake of his counsel").

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[1] This is a paraphrase of Judge Clark's dissenting opinion in **Winters v. Cook**, ___ F. 2d ___ (5th Cir., No. 71-3323, decided September 20, 1972). **Winters** held that a 1963 plea of guilty to a Mississippi murder indictment did not bar a Negro from a federal habeas corpus action in 1971 challenging the racial composition of his grand jury.

In the present case there is no evidence of any negligence or incompetence by counsel for Mr. Henderson. His client admitted his guilt. The police had a confession. Counsel advised his client to plead guilty. Based on a recommendation of ninety-nine years as a result of the plea, the defendant was spared the electric chair. A lawyer of the eminence and skill of Mr. Justice Marshall had attacked the racial composition of the grand and petit juries in the **Kennedy** case tried near Nashville. Counsel for Mr. Henderson did everything that could be done for his client—he saved his life. It would have done no good to object to the grand jury.[8] There was no extant recognized right which could be said to have been "waived".

**4. A valid conviction in this case should be accorded finality and not overturned needlessly.**

When current grand jury criteria are applied to grand juries of a quarter of a century ago, the practical effect is that the new constitutional rule of criminal procedure is being applied retroactively. This Court has refused to apply such a rule where the defendant was unable to demonstrate actual prejudice. **Adams v. Illinois**, 405 U.S. 278 (1972). This Court recognized in **Jenkins v. Delaware**, 395 U.S. 213, 219 (1969), ". . . society's legitimate concern that convictions validly obtained [should] not be needlessly aborted . . ."

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[8] Even in December, 1968, the state trial judge in his memorandum opinion (A. 63-A. 65) said there was no exclusion on Mr. Henderson's venire. The Davidson County Criminal Judge said (at A. 64): "Petitioner [Willie Lee] Henderson called Judge Hart, a retired jurist of this county and the judge before whom the conviction was had, as a witness. We believe that the testimony of Judge Hart although it does show that relatively few Negroes served on the petit juries during the 1940's, that his testimony taken as a whole certainly negatives the idea of purposeful exclusion of members of the Negro race. The law under which this defendant was indicted and tried provided the same method of jury selection as is used currently in Davidson County and we have held there is no such exclusion resulting from the present system."

A liberal measure of finality is to be accorded to a plea of guilty by a criminal defendant. See **McMann v. Richardson**, 397 U.S. 759 (1970); **Parker v. North Carolina**, 397 U.S. 790 (1970); **Brady v. United States**, 397 U.S. 742 (1970); and **North Carolina v. Alford**, 400 U.S. 25 (1970).

This Court in **McMann** stated:

> "In our view a defendant's plea of guilty based on reasonably competent advise is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." 397 U.S. at 770, 771.

Judge Clark, dissenting in the Fifth Circuit case of **Winters v. Cook**, *supra*, says (slip. op. at 20-21):

> "If **McMann** stands for the proposition that habeas corpus is not available where counsel has given erroneous advice to his client who pleads guilty as a result thereof, surely we should not intervene where the attorney merely failed to inform his client of a single possible constitutional claim which he thought best to use as coin for barter with the prosecution. Where the attorney reached a more than arguably correct decision involving many complicated and uncertain variables, we should not impose a rule requiring that he inform his client as to the precise nature of each variable. A lawyer ought not have to conduct a course in constitutional law for his client to validly discharge his position of trust.

"The possibility of prejudice in this case is less than a gossamer one. I have no doubt but that petitioner would have pleaded guilty even if he had known of his constitutional claim. If the rule proscribing more severe penalties on retrial had not existed, thus allowing him to seek a new trial without sacrificing the advantage he secured by his guilty plea, this petition would never have been exposed to the clerk's file stamp. Lawyers worth their salt, as the one condemned today most certainly is, acutely feel the oppressive weight of professional responsibility when it must carry the stake of human life. I say counsel here fully merited the confidence bestowed on him. This decision not only misjudges the man, it does violence to our system of justice."

If Mr. Henderson, who was represented by retained counsel and plead guilty, is entitled to habeas corpus relief, so will all those defendants who were indicted prior to 1953 when the first Negro was seated on the Davidson County, Tennessee grand jury. Not only will Negroes be entitled to this relief, but also all defendants raising this claim. See **Peters v. Kiff**, 407 U.S. 493 (1972). Should this right be given to defendants who entered pleas of guilty, then it must also be extended to those who professed their innocence. The floodgates would be open. Any retroactive application of this doctrine "would seriously disrupt the administration of our criminal laws." **Johnson v. New Jersey**, 384 U.S. 719, 731 (1966). The Court should hold here that "[t]he unusual force of the countervailing considerations strengthens our conclusion in favor of prospective application." **Stovall v. Denno**, 388 U.S. 293, 299 (1967). Under the criteria announced in **Chapman v. California**, 386 U.S. 18 (1967) and **Harrington v. California**, 393 U.S. 250 (1969), any error in the 1948 grand jury also was "harmless beyond a reasonable doubt."

## CONCLUSION

The judgment of the Sixth Circuit should be reversed and the petition for the federal writ of habeas corpus dismissed.

Respectfully submitted

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DEC 20
MICHAEL RODAK,

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-6481

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CLIFFORD H. DAVIS,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. 72-95

---

LEWIS S. TOLLETT, Warden,

*Petitioner,*

v.

WILLIE LEE HENDERSON,

*Respondent.*

---

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

## BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

---

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## BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS *AMICUS CURIAE*

## Interest of Amicus*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. The charter was approved by a New York Court, authorizing the organization to serve as a legal aid society. The NAACP Legal Defense and Educational Fund, Inc. (LDF), is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties in this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts, in cases involving many facets of the law.

Over a long period of time, LDF attorneys have handled, here and in other courts, many cases involving the unconstitutional exclusion of blacks from jury venires.** Throughout this period, LDF has handled many jury discrimination cases in which our help has been sought only after blacks have been convicted and in which the issue was not raised at trial by their then counsel. This experience has demonstrated to us the vital importance of the availability of federal post-conviction remedies as often the only

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* Letters of consent from counsel for the petitioners and the respondents in both of these cases have been filed with the Clerk of the Court.

** *E.g., Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Sims* v. *Georgia*, 389 U.S. 404 (1967); *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1970); *Turner* v. *Fouche*, 396 U.S. 346 (1970); *Alexander* v. *Louisiana*, 405 U.S. 625 (1972).

available mode to vindicate the most blatant violations of a fundamental right. Therefore, LDF has a particular interest in the outcome of these cases since they raise serious questions as to the continued vitality of both habeas corpus and motions under 28 U.S.C. § 2255 as vehicles by which LDF may carry out its purpose.

## Summary of Argument

### I.

This Court has held, in a consistent line of cases from *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), through *Fay* v. *Noia*, 372 U.S. 391 (1963) and *Sanders* v. *United States*, 373 U.S. 1 (1963), to *Humphrey* v. *Cady*, 405 U.S. 504 (1972), that a waiver of fundamental constitutional rights can not be presumed from a procedural default. Rather, in a proceeding for post-conviction relief, a federal court can bar relief on the basis of waiver only upon a finding that the defendant himself made a deliberate and understanding decision not to raise the issue at trial.

### II.

These principles apply with full force to claims of jury discrimination arising under the Constitution. In neither of the two cases before the Court has such a deliberate choice on the part of the defendant not to raise a challenge to the indictment on grounds of racial discrimination been demonstrated.

### III.

Strong considerations of public policy militate against the imposition of any rule of forfeiture that would bar black defendants from obtaining post-conviction relief from un-

constitutional jury selection procedures. Lower federal courts have recognized that failure of defense counsel, without acquiescence by defendants, to raise this issue cannot constitute waiver. Any other holding would result in the undermining of 90 years of efforts of this Court to protect the rights of black defendants indicted and convicted by a white-dominated system of justice.

## ARGUMENT

These two cases present to the Court the question whether the rule regarding waiver established by *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), and reiterated in *Fay* v. *Noia*, 372 U.S. 391 (1963), apply in cases raising the claim that blacks have been excluded from grand juries in violation of the Fifth and Fourteenth Amendments to the Constitution of the United States. Thus, they involve, in the context of both federal and state prosecutions, the standards by which a federal court on collateral relief should determine whether there has been an effective waiver of the right to object to the denial of this fundamental constitutional right by failure to comply with procedural rules as to when such a challenge should be made. In *Davis* v. *United States*, No. 71-6481, the issue is whether the simple failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure in and of itself constitutes a waiver barring relief in a 28 U.S.C. § 2255 proceeding. *Tollett* v. *Henderson*, No. 72-95, involves the question as to whether the failure to comply with a similar Tennessee court rule also militates against a defendant being able to raise the claim on habeas corpus brought pursuant to 28 U.S.C. § 2254.

Despite the fact that one case is a federal and the other is a state prosecution, *amicus* urges that both are governed by the rule laid down in *Johnson* v. *Zerbst*, *supra*, that

"'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights" and that they "'do not presume acquiescence in the loss of fundamental rights.' A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." 304 U.S. at 464.

## I

### The Requirements for Finding a Waiver of a Fundamental Constitutional Right in Both State and Federal Courts Require an Affirmative Showing That the Defendant Himself Acquiesced in Their Non-Assertion.

*Johnson* v. *Zerbst* itself was a collateral attack on a federal conviction, the issue being whether the defendant had waived his right to representation by counsel guaranteed by the Sixth Amendment to the Constitution of the United States. The lower courts had essentially held that the procedural default of the defendant in failing to request appointment of counsel at trial barred relief in the collateral proceeding. This Court unequivocally rejected such a view. Rather, it held that in any case the question was whether there had been "an intelligent waiver" of the right involved and that that finding could be made only after an examination of the particular facts and circumstances surrounding the case demonstrated that the defendant affirmatively decided to forego the right in question. Thus, the mere failure affirmatively to assert the right was not enough to bar collateral relief. 304 U.S. at 464.

The *Johnson* rule was reaffirmed in the strongest possible terms in *Fay* v. *Noia, supra,* which involved a state prosecution, and which held that in a proceeding for col-

lateral relief in federal court, waiver could not be presumed by failure to pursue or follow a particular rule of procedure. To follow such a rule of forfeiture would be to "introduce legal fictions into federal habeas corpus."[1] Thus, the inquiry required by a federal court is to determine:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forwent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as a deliberate bypassing of state procedures. . . .
> 372 U.S. at 439.

Then, and only then, "it is open to the federal court on habeas to deny him all relief." *Ibid.* The court reemphasized that the standard required "the considered choice of the petitioner. . . . A choice made by counsel not participated in by the petitioner does not automatically bar relief."

Shortly after the decision in *Fay*, this Court completed the circle by making it clear that the *Fay* standards applied equally in a 28 U.S.C. § 2255 proceeding. *Sanders* v. *United States*, 373 U.S. 1, 18 (1963). And see, *Kaufman* v. *United States*, 394 U.S. 217, 228 (1969). As recently as last term, this Court, by a unanimous seven-member panel, reaffirmed that the requirements of *Johnson* and *Fay* were still the law and stated: "If the District Court cannot find persuasive evidence of a knowing and intel-

[1] As the Fifth Circuit has put it, in a case involving jury discrimination: "The 'waiver' asserted in this case is simply a diaphanous euphemism for forfeiture of rights resulting from a procedural default." *Labat* v. *Bennett*, 365 F.2d 698, 707 (5th Cir. 1966).

ligent waiver on the part of petitioner himself, then the Court should proceed to consider petitioner's constitutional claims." Therefore, a defendant "is not necessarily bound by the decision or default of his counsel." *Humphrey* v. *Cady*, 405 U.S. 504, 517 (1972).

## II

**The *Johnson-Fay* Requirements Apply With Full Force to Jury Discrimination Claims in Both State and Federal Courts.**

We have set out above the general rule for determining whether there has been a waiver of a fundamental constitutional right. In its terms, the *Johnson-Fay* rule applies to all such rights without exception,[2] and it has in fact been applied in a variety of circumstances. See, *e.g.*, *Jackson* v. *Denno*, 378 U.S. 368, 370 n. 1 (1964) (challenge to procedural rules governing admission of confessions; the *Fay* rule provides "the *only* ground for which relief may be denied in federal habeas corpus for failure to raise a federal constitutional claim in the state courts" (emphasis added)); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965) (objection to unconstitutionally seized evidence); *Humphrey* v. *Cady*, *supra* (objection to procedures for commitment as a sex crime offender).

It is clear that the same principle also must apply in cases involving the right to object to discrimination in the selection of juries. It is no overstatement to assert that perhaps no other constitutional right has been recog-

[2] "Nothing in *Fay* v. *Noia* suggests that the Supreme Court intended to establish a hierarchy of constitutional protections and limit the applicability of the classic definition of waiver to those rights occupying the highest positions." *Henderson* v. *Tollett*, 459 F.2d 237, 239 (6th Cir. 1972).

nized by this Court for so long as being absolutely fundamental to the requirements of due process and equal protection. From *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) through *Alexander* v. *Louisiana*, 405 U.S. 625 (1972), this Court has held repeatedly that racial discrimination in the selection of juries violates the most fundamental right to be tried by a system of justice free of racial bias. See also, *Patton* v. *Mississippi*, 332 U.S. 463 (1947), and cases cited at 465 n. 3. The right fully encompasses indictment by grand jury, *Alexander* v. *Louisiana*, 405 U.S. at 626 n. 3.

The applicability of *Johnson* and *Fay* has been duly recognised by federal courts when faced with questions of jury discrimination by states in violation of the Fourteenth Amendment. Indeed, the circuit courts have been unanimous in holding that the right is of the fundamental character contemplated by *Johnson*, and that therefore the failure to comply with state procedural rules will not in and of itself result in a waiver of the right to object to discrimination. Rather, the burden is on the state to demonstrate by affirmative evidence that the decision not to challenge the composition of either the grand or petit jury was deliberately made by the defendant himself with full understanding of the consequences thereof, free from any countervailing coercive pressures. See, *e.g.*, *Wade* v. *Yeager*, 377 F.2d 841 (3rd Cir. 1967); *McNeil* v. *North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964); *Henderson* v. *Tollett*, 459 F.2d 237 (6th Cir. 1972); *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971).

We urge, therefore, that the Sixth Circuit in *Tollett* was correct in its refusal to impose a rule of forfeiture, particularly in view of the facts of the case. Both the district court and the court of appeals conducted precisely the inquiry required by *Johnson*, *Fay*, and *Humphrey*. They

found that not only the petitioner, but his counsel were unaware of even the possibility of challenging the composition of the grand jury, and that the idea would not have occurred to *any* Tennessee lawyer at the time. Therefore, there was clearly no decision at all on the matter, let alone one made for tactical reasons.[3]

None of the State's grounds for escaping the application of *Johnson* and *Fay* are persuasive. The argument that the jury selection methods used in 1948 were not unconstitutional under the prevailing law at the time is simply wrong. No blacks ever served on a grand jury in the history of the county until 1953, five years after Henderson's indictment, in a county more than 25% black. This was precisely the kind of facts held to establish a *prima facie* case of jury discrimination in *Norris* v. *Alabama*, 294 U.S. 587 (1935), and *Neal* v. *Delaware*, 103 U.S. 370 (1881), decided thirteen and sixty-seven years, respectively, before the indictment was handed down in this case.

The argument that Henderson's counsel may not have raised the issue because he decided it would be futile to do so because of recent decisions of the Tennessee Supreme Court is not supported by the record. To the contrary, it

[3] Indeed, with one exception, it is difficult to imagine *any* constitutionally acceptable tactical reason for not challenging racial discrimination in the composition of juries. Fear of arousing hostility in the white community on the part of counsel is not, of course, an acceptable reason for not making a challenge, see *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964), *cf.*, *Fay* v. *Noia*, 372 U.S. at 439-440, despite the State of Tennessee's assertions to the contrary here (Brief for Petitioner in No. 72-95, p. 6). The one exception would be a case where counsel and the defendant deliberately decided not to object to the array on the hope of getting a second opportunity to contest a conviction if an appeal on other grounds failed. Such a state of facts might well amount to an abuse of the remedy of habeas corpus or 2255 within the meaning of *Sanders* v. *United States*, 373 U.S. 1, 9-11 (1963). In neither of the two cases before the court was such an abuse either pleaded or proven.

simply never occurred to counsel that any such claim existed.[4]

Finally, the fact that Henderson pleaded guilty to the crime charged does not put him in a different position *vis-a-vis* his right to challenge his indictment than a defendant who has gone to trial. This Court has repeatedly held that the right to challenge an unconstitutional grand jury is independent of the right to challenge the petit jury, and that the same principles apply to each. See, *Alexander* v. *Louisiana*, 405 U.S. at 626, n. 3. Thus, it has rejected the position that discrimination in the selection of the grand jury is of no moment since an indictment is not a conviction and any defect is cured by trial before a constitutionally acceptable petit jury. *Pierre* v. *Louisiana*, 306 U.S. 354 (1939). See also, *Hill* v. *Texas*, 316 U.S. 400, 406 (1942). No more than does a judgment of guilty by a jury, after a full trial (see, *Cassell* v. *Texas*, 339 U.S. 282 (1950), does a plea of guilty wipe out the action of an unconstitutional grand jury.[5]

Furthermore, it cannot be maintained that the plea of guilty itself operated as a waiver of all objections to constitutional infirmities in the proceeding. Such a contention

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[4] Even if supported by the evidence, the argument proves too much. Surely, counsel's decision, not acquiesced in by the defendant, not to raise a valid issue because he thought it could not be won, is not a decision made by the defendant with knowledge of what he is surrendering as contemplated by *Johnson* and *Fay*.

[5] If anything, the opposite should be the case. If in fact a defendant has had a trial before a constitutionally adequate petit jury it would be at least appear that there is not the kind of abrogation of Fourteenth Amendment rights of black defendants by the entire judicial system. This court has indicated that particular attention must be given to guilty plea cases to ensure that there has been no violation of constitutional rights, precisely because the defendant has given up the procedural protections inherent in a jury trial. See, *Boykin* v. *Alabama*, 395 U.S. 238, 242-44 (1969); *Rice* v. *Olson*, 324 U.S. 786 (1945).

was specifically rejected by this Court in *Rice* v. *Olson*, 324 U.S. 786 (1945). There, the Court rejected the position that when a defendant pleads guilty it can be presumed that he "'absolutely' and finally" waived his right to be represented by counsel. 324 U.S. at 788. It was noted that the holding of the state court was based on the proposition that such a plea "'operates as a waiver of any defense, and . . . with it, of course, the constitutional guarantees with respect to the conduct of criminal prosecutions.'" *Id.*, n. 2.

This Court held to the contrary, pointing out that such a presumption could not be maintained in the face of an allegation by the defendant in his petition for collateral relief that he did *not* waive the right in question. That allegation "squarely raised a question of fact" that could not be resolved by any presumption drawn from the bare fact of a guilty plea. Rather, it must be "determined by evidence" going to the issue, *inter alia*, of whether the defendant waived his right "intelligently and understandingly." *Id.* at 788-789. See also, *Carnley* v. *Cochran*, 369 U.S. 506, 515-516 (1962); *Boykin* v. *Alabama*, 395 U.S. 238 (1969).

In *Tollett*, of course, the precise issue is whether Henderson "intelligently and understandingly" gave up his right to challenge the composition of the grand jury. No more than was the case in *Rice* v. *Olson* can that question be resolved by reliance on a presumption attaching to a plea of guilty. Rather, the courts below made the inquiry mandated by *Rice* and determined on the basis of the evidence that no understanding waiver had been made. *Winters* v. *Cook*, 466 F.2d 1393 (5th Cir. 1972).

In summarizing our position with regard to *Tollett*, we urge that the courts of appeals have been correct in deciding waiver questions pursuant to the standards estab-

lished in *Johnson* and *Fay*. This court should therefore affirm the Sixth Circuit's decision, and uphold the courts of appeals' approach in cases raising the issue of the availability of habeas corpus relief in state jury discrimination cases.

Paradoxically, in cases involving *federal* prosecutions, where relief under § 2255 is sought on the basis of jury discrimination, the lower courts have been much less consistent in applying the standards of *Johnson* and *Fay*. The Fifth Circuit in particular, which has been diligent in protecting the rights of *state* prisoners from the application of a strict rule of waiver for non-compliance with procedural rules, has, on the other hand, rigidly applied a rule of forfeiture in federal prosecutions regardless of the circumstances. Thus, in the *Davis* case the court, relying on a series of earlier decisions, held simply that failure to comply with Rule 12(b)(2) of the Federal Rules of Criminal Procedure, operated as an automatice forfeiture of the right of a black defendant to object *on constitutional grounds* to the exclusion of blacks from the grand jury that indicted him.

*Amicus* urges that there is no basis in law or reason for this inconsistent result, but that it flies in the face of this Court's decisions from *Johnson* through *Humphrey*. The Fifth Circuit has mechanically applied the decision in *Shotwell Manufacturing Co.* v. *United States*, 371 U.S. 341 (1963), to all instances where a federal defendant has not challenged his jury prior to the time of trial, and we contend that this automatic reliance on *Shotwell* is misplaced and that that case is distinguishable.

In *Shotwell*, corporate defendants raised a question as to the legality of the composition of the jury on the appeal itself some years after the original trial. The grounds for

the challenge in *Shotwell* were based on alleged violations of the federal jury statutes and the defendants relied upon this Court's supervisory power over the administration of those statutes in the lower federal courts. See, *Ballard* v. *United States*, 329 U.S. 187 (1946). The claim was apparently not made that members of the defendants' own class were excluded from jury service, but that, because of improper administrative action, the statutes' requirement that a cross-section of the community be empanelled was not met. Thus, under the law prevailing at the time, the claim made in *Shotwell* was evidently not viewed by this Court as one of constitutional dimension.[6] Similarly, the cases cited with approval in *Shotwell*, 371 U.S. at 362, all deal with challenges based on violations of federal statutory rights as declared by this Court in cases such as *Ballard* v. *United States, supra*, and *Thiel* v. *Southern Pacific Company*, 328 U.S. 217 (1946).[7]

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[6] We do not wish to imply by this discussion of *Shotwell* and the cases it relied upon that we do not believe that there is a right guaranteed by the Constitution to a jury that represents a reasonable cross-section of the community. See, *Carter* v. *Jury Commission*, 396 U.S. 320, 330 (1970). Indeed, our contention would be to the contrary if these cases raised that issue, and we have urged that position before this Court in *Alexander* v. *Louisiana, supra*. The point here, however, is that that proposition was not firmly established at the time of *Shotwell*. See, *Fay* v. *New York*, 332 U.S. 261 (1947).

[7] The cases cited with approval in *Shotwell*, 371 U.S. at 362, all raised claims of statutory violations, and evidently did not urge constitutional ones that were deemed to be substantial. *E.g.*, *Frazier* v. *United States*, 335 U.S. 497 (1948) and *Higgins* v. *United States*, 160 F.2d 222 (D.C. Cir. 1946) challenged juries composed largely of government employees. *Hanratty* v. *United States*, 218 F.2d 358 (5th Cir. 1955) and *Miranda* v. *United States*, 255 F.2d 9 (1st Cir. 1958) challenged the exclusion of women. In *Scales* v. *United States*, 367 U.S. 203 (1961), the challenge was based on procedures alleged to be inconsistent with the statutes; although Rule 12(b)(2) was referred to, the trial court, the Court of Appeals, and this Court all also rejected the claim on the merits. *Id.* at 259.

Thus, this Court in *Shotwell* was not presented with a case raising the question of whether the *Johnson* standard of waiver applied in a collateral proceeding by a black defendant seeking to challange jury discrimination on constitutional grounds arising from the exclusion of blacks from juries. Therefore, it is not surprising that the same court that decided *Fay* two months later and that in the same term held in *Sanders* v. *United States*, 373 U.S. 1 (1963) that the *Johnson-Fay* standards applied in federal collateral proceedings, did not discuss the applicability of *Johnson* v. *Zerbst* in *Shotwell*. For if *Shotwell* and Rule 12(b)(2) are read the Fifth Circuit's way, as creating a rule of forfeiture, they are clearly in conflict with *Johnson*, *Fay* and *Sanders*.

*Sanders* involved the standards for deciding whether a defendant was barred from raising a constitutional claim in a second § 2255 petition that might have been raised in an earlier one. The district court applied what was essentially a rule of forfeiture, and held that the failure to raise the issue at the earlier opportunity operated as a bar. Such a ruling is precisely analogous to the Fifth Circuit's position that a failure to comply with Rule 12(b)(2) operates as a similar bar. This Court in *Sanders* rejected such a rule, and applied the *Fay* holding that a deliberate decision on the part of the defendant not to raise the issue for a tactical or other reason must be shown. Thus, the Ninth Circuit correctly recognized that *Sanders* controlled in its holding that a failure to comply with 12(b)(2) did not operate as an automatic forfeiture of the right to challenge jury discrimination. *Fernandez* v. *Meier*, 408 F.2d 974 (9th Cir. 1969).

The same ground we have discussed for distinguishing *Shotwell* also leads to a conclusion that 12(b)(2) does not conflict with *Johnson* and *Fay*. The rule by its terms allows

a court to find no waiver "for cause shown." That language must be read in conformity with the *Johnson-Fay* rule to mean that sufficient cause is established by: (1) the assertion of a constitutional challenge to the grand jury; and (2) the determination by the court that the defendant himself did not participate "knowingly and understandingly" in a deliberate decision not to raise the issue before trial. Thus, whatever the validity of a rule that would require that ordinarily *statutory* challenges to a grand jury be made pursuant to 12(b),[8] challenges on constitutional grounds must be subject to a different standard.

The Fifth Circuit apparently gave no consideration to this distinction in *Davis*, for his motion filed under § 2255 specifically challenges his grand jury "as being an unconstitutional array" since it did not meet the requirements of "the Fifth Amendment of the United States Constitution" as well as those of the federal jury statutes, 28 U.S.C. §§ 1861-1864. Thus, the Fifth Circuit has adopted precisely the rule rejected by this Court in *Johnson* v. *Zerbst*, and its reliance on *Shotwell* and its reference to Rule 12(b) amounts to a holding that the simple failure to comply

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[8] We note in passing that the 1968 Amendments to the federal jury statutes seem to recognize the distinction between a challenge based on noncompliance with the statutes and challenges based on other grounds and the procedural requirements for mounting such a challenge. 28 U.S.C. § 1867 sets forth the required procedure for challenging noncompliance with sections 1861-1864 and requires that such challenges be made before the *voir dire* examination begins or earlier if the noncompliance was or could have been discovered. Section 1867(e) states that "the procedures prescribed by this section shall be the execlusive means by which a person accused of a Federal crime . . . may challenge any jury on the ground that such jury was not selected in conformity with the provisions of this title." The section then goes on to state that it does not preclude the pursuit of other remedies to vindicate any other law, including the Fifth Amendment to the Constitution, prohibiting racial discrimination in the selection of juries.

with that rule in and of itself constitutes a waiver of the constitutional right involved.

It is clear that the lower courts did *not* make the inquiry or find the facts required by *Johnson, Fay* and *Sanders*. The district court placed the burden *on the defendant* to prove somehow that he was not aware of his constitutional rights, and presumed that because of his present legal knowledge and the fact that he had a capable lawyer, he must have known of them. Such a presumption stands *Johnson* on its head, and is, of course, improper. See, *Glasser* v. *United States*, 315 U.S. 60, 70-72 (1942), holding that an *assistant United States attorney* could not be presumed to know of his right to be represented by independent counsel and to have waived it by inaction.

Finally, the lower court's holdings that some special prejudice must be shown in a racial exclusion case in order to escape the requirements of 12(b)(2) cannot be sustained. Whatever may be the validity of that part of the *Shotwell* holding as it relates to the right of persons not of the excluded class to challenge noncompliance with the federal jury statutes, it cannot be the rule in the case of a black defendant challenging the unconstitutional exclusion of blacks.

Indeed, it is clear that a defendant of any race can challenge the exclusion of blacks without any showing of particularized prejudice to him, *Peters* v. *Kiff*, 407 U.S. 493 (1972). In *Peters*, this Court rejected, in the context of a state prosecution, the argument that a white defendant had to show such prejudice because he had not challenged the exclusion of blacks from his jury until he sought collateral relief. The Court held that the fundamental impossibility of demonstrating such prejudice made it unfair to place such a burden on the defendant in a situation where the state was responsible for the continuation of practices that were unconstitutional.

## III

**Any Rule Imposing an Automatic Forfeiture for Failure to Comply With Rules of Procedure Is Particularly Inappropriate in Jury Discrimination Cases.**

In parts I and II of this brief, we have set out the general rule regarding the waiver of constitutional rights and have explained why it applies to jury discrimination cases under the rationale of *Johnson* and *Fay* since they involve a fundamental constitutional right as contemplated by those decisions. Here we urge that other considerations peculiar to the problems raised by racial discrimination in the selection of juries dictate that as a matter of policy a strict rule of forfeiture may not be permitted. This is because jury discrimination by its nature has been a systematic, institutionalized defect in the administration of justice in this country, despite 90 years of pronouncements by this Court.

*Amicus* has a special concern with the problem of racial discrimination in the selection of both grand and petit juries, not only in the South but throughout the United States. In our statement of interest, *supra,* we have noted a long-standing involvement in jury discrimination problems in cases before not only this Court but in lower courts, both state and federal. Because of our experience, we are often contacted by black prisoners who wish assistance in challenging their indictments or convictions because of such discrimination. These requests for help show a consistent pattern which is typified by the two cases before the Court.

A black defendant, without resources and with little knowledge of his legal rights at the beginning of his prosecution, is represented by either retained or court-appointed

counsel, usually white. He is indicted and goes to trial, at which point he may for the first time realize that he is faced with an all or virtually all-white jury array. Of course, he has had no way of knowing the racial composition of the grand jury that indicted him. In most instances, his counsel does not mount a challenge to the jury system as it relates either to the grand or petit jury and the black defendant becomes aware of his right to do so only after he has been convicted and incarcerated and subsequently becomes more acquainted with his legal rights.

The reasons why jury discrimination challenges have not been made more often, despite the evident fact that they could have been in virtually every prosecution brought in southern states and in a substantial portion of those brought in northern states, are not difficult to ascertain. The number of black lawyers and white lawyers cognizant of civil rights issues, those who would be most apt to be concerned about the problem, has been and remains small, particularly in southern states. See, *N.A.A.C.P.* v. *Button*, 371 U.S. 415, 443 (1963), *Sanders* v. *Russell*, 401 F.2d 241 (5th Cir. 1968), *Sobol* v. *Perez*, 289 F.Supp. 392 (E.D. La. 1968).

Thus, black defendants are in the main represented in the first instance by white attorneys whose main experience is with representing white clients. Unfortunately, these lawyers simply do not raise jury discrimination issues in the large run of cases. In the northern states, and now in some southern states, this may be because of the failure to recognize that there in fact may be a problem. This is not surprising because the typical northern situation involves not so much the kind of deliberate discrimination typical of many southern jurisdictions, but rather the use of various devices that have the effect of excluding black jurors. See, *Carmical* v. *Craven*, 457 F.2d 582 (9th Cir. 1971),

*Smith* v. *Yeager*, 465 F.2d 272 (3rd Cir. 1972). With few exceptions, it has only been in recent years that such practices have come to light and their constitutional significance has been recognized.

The same pattern, we believe, also explains the relatively few challenges on racial exclusion grounds to jury selection methods in federal courts. The pattern there again has not been by and large deliberate exclusion of blacks but rather the utilization of selection methods, such as the key-man system, which, however inadvertently, have had the effect of excluding blacks. See, *Rabinowitz* v. *United States*, 366 F.2d 34 (5th Cir. 1966). In *Davis* v. *United States*, of course, precisely such a contention, together with allegations of deliberate exclusion, was made.[9]

In southern jurisdictions ignorance of the possibility of challenging grand and petit juries has in the past, unfortunately, been coupled with the deliberate neglect or tacit acquiescence of white attorneys in the maintenance of an exclusionary jury system. *Tollett* v. *Henderson* presents a vivid example of such a case. Counsel who represented Henderson in Tennessee in 1948 frankly admitted that it simply never occurred to him to challenge racial discrimination in the jury selection system. Similarly, Judge Galbreath of the Court of Criminal Appeals of Tennessee, in his concurring opinion in respondent's collateral proceeding in that court, stated:

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[9] Congress itself has long grappled with problems arising from the racially exclusionary effects of key-man and similar systems in the federal courts. The result of this concern was the passage of the 1968 Jury Selection Act, 28 U.S.C. § 1861 et seq., which sets up a random system of selection from sources which are designed to produce as full a cross-section of the community as possible. With the implementation of this act, jury discrimination problems in the federal courts have, with a few exceptions, been largely eliminated. Petitioner Davis, of course, was indicted and tried prior to the effective date of the 1968 reform.

> No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948, just as scarcely anyone objected to the complete segregation of all public and private facilities of any kind in the State until the next decade. 459 S.W.2d 176, 179-180.

Similarly, the Fifth Circuit has taken judicial notice of the fact that white lawyers simply would not raise the issue because of ignorance of the issue, because of fear of raising hostility in the community, or because of acquiescence in the system. See, *United States ex rel. Goldsby* v. *Harpole*, 263 F.2d 71, 82-83 (5th Cir. 1959); *United States ex rel. Seals* v. *Wiman*, 304 F.2d 53, 68-69 (5th Cir. 1962); *Whitus* v. *Balkcom*, 333 F.2d 496 (5th Cir. 1964); *Cobb* v. *Balkcom*, 339 F.2d 95 (5th Cir. 1964); *Winters* v. *Cook*, 466 F.2d 1393 (5th Cir. 1972).

In light of these realities, a rule that essentially operates as a forfeiture of the right to challenge discrimination in the selection of grand, and presumably petit, juries would mean that blacks would be condemned to remain in prison without recourse even though they were indicted and convicted under procedures blatantly unconstitutional, adhered to in the face of decisions of this Court going back to 1880. These defendants would be placed in this situation through no fault of their own but simply because of defense counsel's essential acquiescence in the system, or their ignorance of the possibility of challenging it.

Thus, these cases concern a fundamental and institutionalized defect in the system of justice that simply cannot be compared to, for example, a decision in a particular case to forego challenging evidence as unconstitutionally seized, or a statement as unconstitutionally coerced. It would be unconscionable to place the burden of the legal

profession's failure to attack this problem on the shoulders of the very persons that this Court has been endeavoring to protect for 92 years.

These considerations also require that the prosecution's claim of an interest in the finality of criminal convictions be rejected. The problem of jury discrimination is one peculiarly within the state's power to correct. It is not a question of the malfeasance or mistake of one police officer in seizing evidence, or of an interrogator or prosecutor overstepping the bounds set by the Constitution in obtaining a confession, on a single judge making an erroneous decision as to a constitutional question arising from the particular facts of a particular case. Rather, an entire system has been maintained with full knowledge of its unconstitutionality, with the active participation of all elements of the very institutions supposed to be on the side of justice, including judges, district attorneys, court personnel, and, unfortunately, in many cases defense counsel. The institutions of government have chosen to violate the Constitution of the United States, not in one individual case, but in every case involving every defendant brought before it. If any party has waived or forfeited its right to insist on a particular interest it is the government itself, and this Court should ensure that all persons convicted under unconstitutional systems of jury selection be able to gain relief, unless they themselves, with full knowledge of the consequences, deliberately chose to forego their rights.

## CONCLUSION

For the foregoing reasons, the decision in No. 71-6481 should be reversed and that in No. 72-95 affirmed.

Respectfully submitted,

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# BRIEF FOR RESPONDENT

DEC 27 1972

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-95

LEWIS S. TOLLETT, Warden
Tennessee State Prison,

*Petitioner,*

v.

WILLIE LEE HENDERSON,

*Respondent.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

## BRIEF FOR THE RESPONDENT

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

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No. 72-95

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LEWIS S. TOLLETT, Warden
Tennessee State Prison,
*Petitioner,*

v.

WILLIE LEE HENDERSON,
*Respondent.*

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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## BRIEF FOR THE RESPONDENT

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## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 459 F.2d 237, and appears in the Petition for Certiorari at page 1a. The opinion of the United States District Court for the Middle District of Tennessee is reported at 342 F. Supp. 113, in the Petition for Certiorari at page 13a, and in the Appendix at page A. 21.

## JURISDICTION

Jurisdiction is vested in this Court by virtue of the order herein granting certiorari on October 16, 1972, and is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

The Federal habeas corpus statute, Title 28, United States Code, § 2241, provides in pertinent part:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless–
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States.

## QUESTION PRESENTED

Whether a semiliterate black youth of 20, unaware of his right to object to his 1948 indictment for first degree murder by a grand jury from which members of his race had been systematically excluded in violation of the Fourteenth Amendment to the United States Constitu-

tion, has waived his right to object in a subsequent habeas corpus action by pleading guilty to that indictment on the advice of counsel who was himself unaware of, and did not advise the defendant of, his right to object.

## STATEMENT OF THE CASE

Respondent and two other men were arrested in Nashville, Tennessee for the armed robbery and shooting of a liquor store employee, which occurred on January 22, 1948. When the victim died on February 12, 1948 [Of *pneumonia*, according to Respondent; See Petition for Writ of Habeas Corpus, A. 9], first degree murder indictments were returned by the Davidson County, Tennessee Grand Jury. The Grand Jury was at that time an all-white body; the first Negro to serve on said grand jury was not called until 1953.

Respondent signed a confession, but later claimed that the confession had been coerced. His mother retained counsel, and a plea of guilty was entered in March, 1948, resulting in a 99 year sentence. Neither he nor his attorney was aware at the time of the plea that blacks had been systematically excluded from grand jury service in Davidson County, nor that he had a right to object to the indictment on those grounds (A. 95-96).

In 1968, Respondent filed a habeas corpus action in the state court, alleging for the first time that he had been denied the equal protection of the laws in violation of the Fourteenth Amendment to the United States Constitution in that members of his race had been systematically excluded from the grand jury which had indicted him. (A. 45-46) Proof at the evidentiary hearing established that no black was to serve on the Davidson County grand jury until 1953 (A. 102, A. 123, A. 142).

The trial judge was called as a witness and testified that Negroes on the jury list were designated by a mark of "colored" following their names, or merely "John Jones, C." (A. 105). The state trial judge in the habeas corpus action denied the petition, (A. 63-65), the Tennessee Court of Criminal Appeals affirmed (A. 143-A. 169), and the Tennessee Supreme Court, denied certiorari (A. 143).

Thereafter, Respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Tennessee, Nashville Division, alleging the systematic exclusion issue. The District Court, relying on the records in the state proceeding, found for the Respondent on the issue of systematic exclusion (which was conceded by Petitioner to Respondent) and on the issue of whether Respondent had waived his right to object by entering a plea of guilty without first objecting to the indictment. The District Court granted the petition and ordered the release of Respondent (A. 21-A. 33). The United States Court of Appeals for the Sixth Circuit affirmed (Pet. cert. 1a-12a; 459 F.2d 237). This Court granted certiorari on October 16, 1972.

## SUMMARY OF ARGUMENT

The evidence adduced herein completely substantiates the findings below of systematic exclusion of blacks from the grand jury which indicted Respondent, a black man. Further, the Petitioner conceded in both the District Court, and in the Court of Appeals for the Sixth Circuit that blacks had been systematically excluded from that grand jury, and is thereby foreclosed from denying that fact before this Court.

Further, it is clear that Respondent did not waive his right to object by pleading guilty without first objecting

to the indictment. The rights involved, to the equal protection of the laws and to due process of law, are rights conferred on Respondent by the Fourteenth Amendment to the federal Constitution, and are therefore federal rights. Waiver of federal rights is a federal question, and the federal definition of waiver must be applied to the particular facts. Where, as here, Respondent is without knowledge of these rights, and his attorney is also unaware, and did not advise Respondent of the violation of his rights and of his right to object thereto, there cannot be an intentional relinquishment or abandonment of a known right or privilege, and, absent a showing of a deliberate trial strategy to intentionally bypass state procedural requirements, no waiver can be inferred or presumed. Further, where an indictment is returned by an unconstitutionally constituted grand jury, that indictment should be declared void rather than voidable, thereby rendering any plea thereto ineffective for any purpose, including as a basis for an inferred waiver of the defendant's rights.

## ARGUMENT

### I.

**BLACKS WERE UNCONSTITUTIONALLY EXCLUDED SYSTEMATICALLY FROM GRAND JURY DUTY IN DAVIDSON COUNTY, TENNESSEE WHEN RESPONDENT WAS INDICTED, AND PETITIONER ADMITTED THIS FACT IN BOTH THE DISTRICT COURT AND THE COURT OF APPEALS, THEREBY ABANDONING AND WAIVING HIS RIGHT TO ARGUE THAT ISSUE BEFORE THIS COURT.**

Petitioner contends herein that blacks were not systematically excluded from grand jury duty in Davidson County, Tennessee in 1948. Yet Petitioner *conceded* in both the District Court and in the Court of Appeals that blacks *were* systematically excluded from jury duty in violation of law, and elected to proceed in both courts solely on the issue of waiver.

The following is excerpted from Petitioner's brief in the Court of Appeals:

### STATEMENT OF THE CASE

The petitioner-appellee, hereinafter referred to as Henderson, was a black youth about twenty years of age when he was indicted by the Davidson County, Tennessee Grand Jury in 1948 on a charge of murder in the first degree. *Black people had been systematically excluded from grand jury duty prior to the time of Henderson's indictment and for some time after his indictment in 1948...*

. . . . . .

Henderson filed a petition for writ of habeas corpus in the United States District Court, Middle

> District of Tennessee, Nashville, Tennessee, on December 29, 1970, alleging among other things that his constitutional rights had been violated because blacks had been systematically excluded from the grand jury which indicted him. The respondent [Petitioner herein] *agreed that blacks had been systematically excluded* and that the only issue before the court was whether or not Henderson had waived his right to question the composition of the indicting grand jury by failure to object to the composition prior to entering the plea. [Brief of Petitioner herein, respondent in the Court of Appeals, Lewis S. Tollett, Warden, Sixth Circuit, pages 1-3; (Emphasis supplied).]

In the first excerpt from Petitioner's brief in the Court of Appeals, Petitioner admits as fact to the Court of Appeals that blacks were in fact systematically excluded from grand jury duty at the time Respondent was indicted, and Petitioner also admits that Respondent is black. In the second excerpted paragraph of that brief, Petitioner is admitting that he had conceded the same points in the District Court, and that Petitioner elected in the District Court to proceed solely on the issue of waiver.

The District Court found that not only had Henderson established his claim that blacks had been systematically excluded from the grand jury which indicted him, but that Petitioner had conceded the issue in Henderson's favor:

> [Tennessee] *concedes*—as it is apparent it must—that Henderson has proved everything necessary fully to support his contention that members of

> his race were systematically excluded from the grand jury which indicted him. [Tennessee] thus asserts "... that the only (remaining) issue is whether or not [Henderson] has waived his right to question the composition of the indicting grand jury ...," (A. 25-A. 26; Emphasis supplied).

Further, on appeal, the Court of Appeals for the Sixth Circuit found:

> The Respondent [Petitioner herein] *does not contest the finding of impermissible exclusion on appeal.* He bases the appeal *entirely* on the claim that Henderson waived any right to attack the indictment because he did not make his challenge before pleading to the charges and because he pled guilty to the indictment. (Pet. cert. 3a-4a; Emphasis supplied.)

The Court of Appeals found that the evidence adduced in the District Court completely and fully supported Henderson's contentions, and the District Court's finding of impermissible exclusion under the standards set by this Court in *Whitus v. Georgia* 385 U.S. 545 (1967), and by the Tennessee Supreme Court in *Bonds v. State*, 421 S.W.2d 87 (1967).[1]

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[1] The Sixth Circuit said (Pet. cert. 4a, n.2):

> The evidence showed that no Negro had served on the Davidson County Grand Jury in the years prior to 1948 and that no Negro was to serve on that panel until 1953, when a single Negro was called to duty: this despite the fact that Negroes made up over 25% of Davidson County's population. An explanation for this startling disparity may be found in the evidence. Proof at the hearing showed that whenever a Negro citizen's name appeared in the venire list from which grand jurors were selected by the county judges, a "c" or "col" abbreviation was placed before his name; officials were thus provided with a simple means of determining which citizens might be appropriately "excused" from grand jury

Respondent respectfully suggests that Petitioner, having conceded in Respondent's favor the issue of systematic exclusion in both the District Court and the Court of Appeals, has abandoned and waived his right to raise the issue in this Court, and is estopped from so doing. *United States v. Spector*, 343 U.S. 169, reh. den. 343 U.S. 951 (1952).

It has been decided that if an issue is conceded in the trial court it cannot be raised on appeal, *Drop Dead Co. v. S.C. Johnson & Sons, Inc.*, 326 F.2d 87 (9th Cir. 1963), cert. den. 377 U.S. 907. Further, issues not briefed nor argued in lower courts will not be considered by higher courts on appeal, *Walters v. City of St. Louis, Mo.*, 347 U.S. 231 (1954); *In re Donnelly's Estate*, 397 U.S. 286 at 294, n. 5 (1970).

The arguments made on pages 7-14 of Petitioner's brief herein concerning the term "systematic exclusion as it was understood in 1948," his citation of *Kennedy v. State*, 186 Tenn. 310, 210 S.W.2d 132 (1948), and his gratuitous suggestion that, due to *Kennedy, supra*, a challenge by Respondent to the illegal indictment would have been an "exercise in futility," were not raised, briefed nor argued in the District Court nor in the Court of Appeals. Petitioner now asks this Court to reverse two distinguished lower courts because they ruled adversely to him on issues which he had conceded to Respondent from the outset.

Petitioner's decision to concede to Respondent the issue of systematic exclusion in the lower courts was a laudable concession, fully supported by the evidence. But

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duty, It is apparent from the absence of any Negroes on the grand jury panels that the means were used and the impermissible end of exclusion accomplished.

Petitioner cannot now raise the issue for the first time before the Supreme Court. He elected to proceed below on the sole issue of waiver, and should be limited thereto here as well.

Respondent, nevertheless, feels constrained to respond to some of Petitioner's arguments on the systematic exclusion issue. For nearly a century, it has been fundamental that a criminal defendant is denied the equal protection of the laws if indicted by a grand jury from which members of his race have been systematically excluded solely on racial grounds. *Strauder v. West Virginia*, 100 U.S. 303 (1880); *Whitus v. Georgia, supra.*; *Patton v. Mississippi* 332 U.S. 463 (1947); *Avery v. Georgia*, 345 U.S. 559 (1953); *Norris v. Alabama*, 294 U.S. 587 (1935); *Eubanks v. Louisiana*, 356 U.S. 584 (1958); *Peters v. Kiff*, 407 U.S. 493 (1972).

This was the law when Respondent was indicted, and it was the law earlier that year when the case of *Kennedy v. State, supra.*, was decided by the Tennessee Supreme Court. Petitioner claims that the failure of the defendants in *Kennedy* to overturn their convictions on the systematic exclusion issue presented Respondent with a *fait accompli* which would have rendered any challenge by Respondent to his grand jury an "exercise in futility."

Petitioner is mistaken. The facts in *Kennedy* showed at best disproportionate representation of Negroes on the grand jury of Maury County, Tennessee, not systematic exclusion, although that was the claim. The opinion clearly shows that of one hundred nine prospective jurors, ten (about 9%) were Negroes. Further, several Negroes testified at the *Kennedy* hearing that they had served as jurors at the same term at which Kennedy was tried, and earlier, and that their names had been placed in

the jury box as early as 1944. The Tennessee Supreme Court held that the presence of these Negroes on the jury lists of Maury County, Tennessee indicated that there was no systematic exclusion of Negroes from jury service in that county.

In *Kennedy*,, the State also conceded that discrimination could be presumed from proof that no Negroes had been summoned for grand or petit jury service. The difference between *Kennedy* and the instant case is that in *Kennedy* Negroes had been called and in the instant case, Negroes had not been called to jury service. In Maury County there was no systematic exclusion, and in Davidson County, there was such exclusion. (See the opinion of the Tennessee Supreme Court quoted on pp. 10-12 of Petitioner's Brief.)

The Petitioner also second-guesses Respondent's trial counsel's "tactics" in his assertion that, in light of the confession given by the Respondent, the lawyer's "duty" to save his client's life by negotiating a plea of guilty in return for a life sentence, and the result in *Kennedy v. State, supra*, counsel had no other choice but to forego the objection to the illegal constitution of the grand jury.

The fatal flaw in this line of reasoning is that Respondent's attorney was *unaware* of the existence of the violation of Respondent's rights. His affidavit, unchallenged at any stage of these proceedings, clearly establishes that he was unaware of the right, of its violation, and that he did not advise Respondent of the right, its violation, and/or Respondent's right to object thereto. Since Respondent's attorney was unaware of his right to object there could not be, as Petitioner implies, a situation where "the attorney merely failed to inform his client of a single possible constitutional claim which he

thought best to use as coin for barter with the prosecution," Judge Clark dissenting in *Winters v. Cook*, 466 F.2d 1393 at 1402 (5 Cir. 1972).

Petitioner's analogy of the present case with the *Kagabein* case [*State v. Kagebein*, Arkansas Supreme Court #5665, presently pending on appeal], in which a fifteen year old boy was sentenced to death, is misplaced. Petitioner states: "Who is to say 24 years from now, an 'enlightened' society will not consider the exclusion of young people from grand juries as constitutionally infirm as the exclusion of any other minority?" The difference is, that when Respondent was indicted in 1948, the United States Supreme Court's ruling in *Strauder v. West Virginia, supra*, had already been the law of the land for *sixty eight years*! The present case does not involve the application of recent standards to an old case; it involves the enforcement of fundamental and long standing constitutional principle upon a state which had seen fit to disregard that principle for almost three quarters of a century.

II.

**DID RESPONDENT'S FAILURE TO OBJECT BEFORE PLEADING TO THE INDICTMENT RETURNED BY A GRAND JURY FROM WHICH MEMBERS OF HIS RACE HAD BEEN SYSTEMATICALLY EXCLUDED IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT CONSTITUTE A WAIVER OF HIS RIGHT TO CHALLENGE THE COMPOSITION OF THAT GRAND JURY IN SUBSEQUENT FEDERAL HABEAS CORPUS PROCEEDINGS WHEN NEITHER HE NOR HIS ATTORNEY HAD BEEN AWARE OF THE RIGHT BEFORE THE PLEA WAS ENTERED?**

Petitioner has divided his argument in his brief into four sections. Respondent feels that there are actually two questions presented in Petitioner's brief and will discuss those issues accordingly, although Respondent will add a third issue which was briefed and argued in both lower courts, the validity of the indictment itself. All arguments advanced by Petitioner will be met in Respondent's brief.

**A. The Rule Requiring Challenge Before Plea.**

Respondent concedes that ordinarily, under both Tennessee law and federal law, a defendant must object to nonjurisdictional defects by motion or plea in abatement before entering a plea. *State ex rel. Lawrence v. Henderson,* 433 S.W.2d 96 (1968) and cases cited therein, Federal Rules of Criminal Procedure, Rule 12(b)(2).

Petitioner relies heavily upon the federal rule, and cites authority to the effect that a *federal* criminal defendant who failed to object to the venire before plea waived his

right to object to an improperly constituted grant or petit jury. But the constitutional right herein held to have been violated is the right to the benefit of the Equal Protection Clause of the Fourteenth Amendment, which states, in part: "... [no] *state* shall deny to any person within its jurisdiction the equal protection of the laws." This prohibition is only operative against the states. There is no federal right to the equal protection of the laws, *Washington v. United States*, 401 F.2d 915, 922 (DC, 1968).

As the District Court below concluded, the Equal Protection Clause "is thus inapplicable to the Federal Government, the Federal Judiciary and the Federal Rules of Criminal Procedure ... whatever it may be that a federal defendant waives under Rule 12(b)(2), it is clearly not the right to complain of a denial of equal protection of the laws by virtue of racially exclusive grand jury selection.... It follows that the waiver provision of Rule 12 is necessarily not analogous to the waiver which [Petitioner] asserts was made by this [Respondent]: the practice in federal court has no bearing whatever on the issue presently before this court, and the cases cited by [Petitioner] are inappropriate in the present context. [A. 30]." The District Court also pointed out that even Rule 12 provides that the court may grant relief from the implied waiver. [A. 28]

### B. The Rationale of the State Prisoner Habeas Cases.

The fact situation involved herein is not a situation of first impression in the Federal Courts. Four circuits have been confronted with federal habeas corpus actions by state prisoners challenging convictions in which members of their races were systematically excluded from their grand or petit juries, or both, and in which no objection

was made to the venire before plea or trial in the state courts. The objections in each were first raised in habeas corpus or other post-conviction proceedings, and in each case were countered with allegations that the state prisoner had waived his right to raise the issue by virtue of proceeding to plea or trial in the state court without raising the issue. *Wade v. Yeager*, 377 F.2d 841 (3d Cir. 1967); *McNeil v. State of North Carolina*, 368 F.2d 313 (4th Cir. 1966); *Cobb v. Balkcom*, 339 F.2d 95 (5th Cir. 1964); *Winters v. Cook, supra.*, and the instant case, *Henderson v. Tollett, supra.* (6th Cir. 1972). The Fifth Circuit, encompassing most of the deep South, has decided many cases involving the questions presented herein. See e.g., *Colson v. Smith*, 438 F.2d 1038 (1971); *United States ex. rel. Goldsby v. Harpole*, 263 F.2d 71 (1959), cert. den. 361 U.S. 838; *Labat v. Bennett*, 365 F.2d 698 (1966), cert. den. 386 U.S. 991; *Windom v. Cook*, 423 F.2d 721 (1970); *Whippler v. Balkcom*, 342 F.2d 388 (1965).

The cases decided have certain facts in common. In each, there was systematic exclusion of members of the defendant's race from either the grand jury which indicted him, the petit jury which tried him, or both.[2] In each, the defendant was unaware of the denial of his rights at the time when the state procedure require him to raise his objection. In some cases the defendant's trial counsel was aware of the violation of the defendant's rights in time to make the objection, and in others [including the instant case] trial counsel was unaware of

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[2] Except in *Peters v. Kiff, supra.*, in which a *white* man objected because *Negroes* had been systematically excluded. The Fifth Circuit ruled that he had not been prejudiced; the Supreme Court disagreed and reversed.

the violation, of the right to object, or both. In all of the cases, the right was first asserted after conviction and sentence and after the time required by the respective state procedural rules and statutes had expired.

In all cases where the defendant himself was unaware of the fact that he had been denied the equal protection of the laws because members of his race were systematically excluded from his grand or petit jury, the federal courts have granted him the relief he sought. These courts have used the same rationale: the right asserted is to the equal protection of the laws guaranteed by the Fourteenth Amendment;[3] since waiver of federal rights is a federal question, *Fay v. Noia*, 372 U.S. 391 (1963), the federal courts have jurisdiction and have applied the "classic" definition of waiver of federal rights which was announced in *Johnson v. Zerbst*, 304 U.S. 458 at 464 (1938): did the defendant's conduct amount to "an intentional relinquishment or abandonment of a known right or privilege?"

To the ubiquitous objection by state authorities that the habeas applicant should be bound by the failure of his trial counsel, in pleading guilty or proceeding to trial without making a timely objection to the tainted indictment, the courts have held that "a choice made by counsel not participated in by the [habeas] petitioner does not automatically bar relief," *Fay v. Noia, supra.*, and have held that the habeas petitioner is not bound by acts of counsel unless "at a minimum counsel's actions should involve 'a *deliberate* choice of strategy' amounting

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[3]Some decisions have also included the right of due process as provided in the Fourteenth Amendment in addition to or even instead of the right to equal protection. *McNeil v. North Carolina, supra.; Cobb v. Balkcom, supra., Peters v. Kiff, supra.*

to an intentional 'bypassing' of state procedures. *Henry v. Mississippi* 379 U.S. 443,451 (1965); *Fay v. Noia, supra.*" *Henderson v. Tollett*, Opinion, Pet. Cert. 7a.

Generally, a voluntary guilty plea, entered upon the advice of competent counsel, implies an intentional and knowing abandonment of rights, *United States ex. rel. Rogers v. Warden of Attica State Prison*, 381 F.2d 209 (2d Cir. 1967). This Court has also held that where the advice given by counsel was "within the range of competence demanded of attorneys in criminal cases," the plea of guilty would not be set aside, *McMann v. Richardson*, 397 U.S. 749 at 771 (1970).

As the Sixth Circuit said below, however, "That line of cases [referring to *McMann, supra.*, and *Brady v. United States*, 397 U.S. 742] did not establish a new general test for examining conduct alleged to constitute a waiver of federal rights; in fact, it reemphasized the importance of *Johnson v. Zerbst* [supra.] as the governing authority on the subject." (Pet. Cert. 10a-11a, n.5). The Sixth Circuit indicated that *Brady, supra.*, and its related cases dealt with inaccurate legal advice and its effect upon a guilty plea which was sought to be vacated because it was involuntary, and are thus distinguishable from the case at bar, in which no challenge to the plea itself has been made.[4]

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[4]The Sixth Circuit discussed the inapplicability of *Brady, supra.*, and its related cases to the present situation at length [Pet. Cert. 11a n.5 (Continued from page 10a)]:

> That line of cases did not establish a new general test for examining conduct alleged to constitute a waiver of federal rights; in fact it reemphasized the importance of Johnson v. Zerbst, 304 U.S. 458, 464 (1938), as the governing authority on the subject. See Brady v. United States, 397 U.S. at 748 n.6. It did not suggest that a valid guilty plea waived the right to challenge all pre-pleading defects when a defendant

*Fay v. Noia, supra.*, established that mere failure to comply with a state procedural requirement does not constitute, necessarily, a waiver of rights bestowed by the United States Constitution. It also established that the finding of such a waiver by a state court does not bar the federal courts from independently determining the issue of waiver in a federal habeas corpus proceeding, since waiver of federal rights is a federal question; that a choice of counsel not participated in by the defendant would not automatically bar relief; and that actions or inaction of counsel would be imputed to the defendant alleged to have waived the state procedural requirement only where it appears affirmatively that the acts or omissions constituting the purported waiver were knowingly and voluntarily participated in by the accused as a deliberate strategy intended as a bypass of a known state procedural requirement. Further, the showing of the defendant's participation must be affirmative, as "acquiescence in the loss of fundamental rights is not to be presumed," and the Courts must "indulge every reasonable presumption

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neither knew nor could have known of the right at the time he entered his plea. It did not deal with a situation in which counsel's advice was competent judged by the time and place at which it was given, but grossly inadequate in light of the clearly established constitutional law of the period.

The Brady line of cases dealt only with challenges to the guilty plea itself; no such challenge has been made here. For this reason alone we believe that Brady and its successors cannot govern our decision here. Given the uniqueness of the concerns which necessarily affect any evaluation of the validity of a guilty plea in our system (see Brady, 397 U.S. at 749-59; McMann, 397 U.S. at 774) the Brady line of cases cannot provide a useful model for the practical application of the Johnson v. Zerbst standards in general. See the excellent discussion of this point in United States v. Liquori, 430 F.2d 842 (2d Cir. 1970); cf. Scogin v. United States, 446 F.2d 416 (8th Cir. 1971); Bannister v. United States, 446 F.2d 1250 (3d Cir. 1971).

against waiver," *Johnson v. Zerbst*, *supra.*; waiver cannot be presumed from a silent record, *Carnley v. Cochran*, 369 U.S. 506 (1962).

Recently, these principles were reaffirmed by this Court in *Humphrey v. Cady*, 405 U.S. 504 (1972). That unanimous decision [In which, however, Justices Powell and Rehnquist did not participate] reiterated that a purported waiver of a federal Constitutional right by not pursuing state remedies must be "the product of an understanding and knowing decision by the [federal habeas corpus] Petitioner himself, who is not necessarily bound by the decision or default of his counsel." The Court went on to hold that there can be a waiver only where the Petitioner himself "made a deliberate, strategic waiver of his claim in State Court."

Finally, in its most recent jury exclusion case, *Peters v. Kiff*, *supra.*, the Supreme Court upheld a federal habeas Petitioner's claim of racial exclusion *even though the claim was not raised at any time in the state courts.*[5]

Respondent concludes from *Peters v. Kiff*, *supra.*, that failure to object to the composition of the grand or petit jury in the state court does not constitute waiver of the right to object in a later federal habeas corpus proceeding.

### C. The Facts in the Instant Case Clearly Show that the Judgment Below Should Be Affirmed.

There is no real dispute that in the instant case blacks were unconstitutionally excluded from the grand jury which indicted Respondent; that Respondent was

[5]The fact that systematic exclusion was first raised in the federal habeas corpus action was only briefly noted in footnote 1 of the opinion of Mr. Justice Marshall, and was briefly commented on in the footnote to the Chief Justice's dissent.

unaware of the violation of his rights and of his right to object there to until years after the conviction and sentence (A.88); that his trial counsel was unaware that blacks had been systematically excluded from grand jury service; and that counsel did not advise Respondent of his rights, that the rights were violated, and that he had a right to object to the indictment. Both Respondent and counsel were without knowledge of this "substantial constitutional right." (Pet. Cert. 10a-11a).

The Respondent at the time of his indictment was a 20 year old black youth who had had less than a sixth grade education. His failure to object to the indictment cannot be held to have been an intentional abandonment of a known right or privilege. One cannot be said to have waived a right, the existence of which was unknown to him at the time of the alleged waiver.

Waiver cannot be imputed to Respondent due to the acts or omissions of his counsel. Since counsel was unaware of the right or its violation, he cannot be said to have made a deliberate decision to waive the right to object as a matter of trial strategy in an attempt to bypass state procedural requirements; and, at any rate, such an attempt to bypass state procedures will not be construed as a waiver unless it is shown that Respondent had knowingly participated in the decision to proceed without making the objection, while fully aware of his right to object. *Fay v. Noia, supra.*

Petitioner's argument assumes what has not been proven: that Respondent's counsel knew of the right and deliberately failed to object to its violation. There is no evidence whatsoever to permit such an inference. Yet even if such were the case, *would* counsel have advised Respondent of the right? As Judge Galbreath said in the

concurring opinion of the Court of Criminal Appeals of Tennessee, which denied relief to Respondent, "No lawyer in this state would ever have thought of objecting to the fact that Negroes did not serve on the grand jury in Tennessee in 1948," *State ex. rel. Henderson v. Russell*, 459 S.W.2d 176, 179 (1970).

Moreover, as stated by the Fifth Circuit in *United States v. Harpole, supra.*, at page 82:

> As Judges of a circuit comprising six states of the deep South, we think that it is our duty to take judicial notice that lawyers residing in many southern jurisdictions rarely, almost to the point of never, raise the issue of systematic exclusion of Negroes from juries.

Several years later, in *Whitus v. Balkcom*, 333 F.2d 496 (1964), at 507, the same Circuit stated:

> The fact, standing alone, that no Negro has ever served on a jury in the particular county where his case is tried strongly indicates, if it does not create a presumption, that there was a tacit agreement by the bar of that county not to raise the constitutional issue. In such case the Negro would have no adequate remedy.

In *Winters v. Cook, supra.*, the Fifth Circuit ruled that Winters [the habeas petitioner], who had no idea that he could object to the jury composition, did not waive his right to raise the issue later, even though the right was known to his counsel, who did not object, ostensibly on tactical grounds. The Court said, at 1396, "That white lawyers representing black clients often fail to raise an objection to jury composition has been recognized as a problem in this circuit." In footnote 2 on the same page, the court stated ". . . such an extreme discrimination could not exist *without the knowledge of the State trial*

*judge*. It was his *duty* to ascertain that Winters had knowledge of his relevant rights." (Emphasis supplied.) [The Fifth Circuit based its decision in part on the invalidity of Winters' guilty plea which was given without knowledge of the right to object. That issue is not relevant herein, the validity of Respondent's plea not having been challenged below.]

The language quoted from the State court herein and the Fifth Circuit cases raises sinister implications: that even if Respondent's lawyer knew of the violation of his client's right in time to object, as Petitioner incorrectly argues, does it necessarily follow that the failure to object was a trial tactic? It would seem more likely that failure to object in Tennessee in 1948 resulted from a conspiracy, however tacit [perhaps even subconscious] among the bar and even the bench, to refrain from asserting this right which was peculiar to Negroes at that time[6].

Petitioner relies on the reasoning of Judge Clark in his dissent in *Winters v. Cook, supra*. That reasoning does not apply herein, as in the *Winters* case trial counsel was fully aware of the impermissible exclusion of blacks from jury service in time to make an objection, and in the instant case, Respondent's trial counsel had no idea of Respondent's rights, much less of the fact that they were violated. In *Winters*, trial counsel used the possibility of objecting to the venire as a negotiating lever to obtain a favorable plea bargain for the defendant. Such was not the case herein. Judge Clark wrote, at page 1399:

> Counsel testified that these constitutional objections were the "pry bar" that he used in getting the state to allow the defendant to enter a guilty plea. . . .

[6]Until June 22, 1972, when *Peters v. Kiff, supra.*, was decided.

> Where, as here, a privately retained lawyer who is well-versed in the defense of murder charges *deliberately* refrains from making a *known* constitutional objection to the composition of the jury in exchange for important and material concessions from the prosecution, *there has been a deliberate by-pass and waiver under Fay and Henry.* (Emphasis supplied.)

Clearly, the result below is not inconsistent with the position taken by Judge Clark in *Winters*. In the instant case there is no evidence of deliberate bypass of state procedure by Respondent's counsel. There is absolutely nothing in the evidence that shows an intent to waive a right to achieve a strategic advantage. There is no showing that counsel had made positive use of the constitutional right in any manner. There is no showing that either Respondent or his attorney were aware of the right or of its violation. There is consequently no waiver of Respondent's right to raise the systematic exclusion issue in federal habeas corpus proceedings, which he has done.

It was established beyond doubt in the evidentiary hearings below that Respondent was not aware of his right to object to the composition of the indicting grand jury at any stage of the proceedings. There was no deliberate choice by either Respondent or his counsel which could conceivably be interpreted as an intentional relinquishment of a known right, nor was there any indication of any intentional bypassing of state procedures. Hence, there was no waiver and the decisions below should be affirmed.

## III.

## DOES SYSTEMATIC EXCLUSION OF MEMBERS OF A PARTICULAR RACE FROM JURY SERVICE CONSTITUTE A JURISDICTIONAL DEFECT?

The District Court herein concluded that the indictment herein, having been returned by a grand jury from which blacks had been systematically excluded, was void, and, since a void indictment confers no jurisdiction upon the trial court, a plea to such an indictment is of no legal effect. [A.26], citing *Bonds v. State, supra.* In *Colson v. Smith*, 315 F. Supp. 179, affirmed at 438 F.2d 1075 (5 Cir. 1971), the Atlanta District Court followed the same reasoning. The Courts of Appeal in each case indicated that in their views, while the petitioners were entitled to relief because there was no waiver under *Zerbst* and *Fay*, the indictments were not void, but voidable. Yet, in *Patton v. Mississippi, supra.*, and again in *Eubanks v. Louisiana, supra.*, this Court held that indictments returned by grand juries from which members of a given race had been systematically excluded "cannot stand", as to any member of the excluded race indicated by such a grand jury.

In *Peters v. Kiff, supra.*, this Court said: "if ... Negroes were systematically excluded from ... grand ... juries, then he was indicted and convicted by tribunals that fail to satisfy the elementary requirements of due process, and *neither the indictment* nor the conviction *can stand.*" (Emphasis supplied.) Since Peters raised the issue for the first time in a federal habeas corpus proceeding, the time for objecting to a nonjurisdictional defect had long since passed. The question arises: does *Peters v. Kiff* mean that systematic exclusion gives rise to a jurisdictional defect, rendering the indictments and convictions of impermissibly constituted juries void *ab initio*?

Such a ruling would simplify cases such as the instant case. If indictments returned by such juries were void, the right to object could never be waived by pleading to a void indictment. Public policy might be served by accomplishing what 18 U.S.C. §243 [providing criminal penalties for public officials convicted of discriminatory jury selection] has apparently failed to do—terminate once and for all the deplorable practice of excluding minority groups from jury service. At least one circuit is waiting for a determination of this issue. In note 1 of its opinion in *Winters v. Cook*, supra., the Fifth Circuit said:

> We do not reach the issue whether a jury from which blacks are systematically excluded constitutes a jurisdictional or a nonjurisdictional defect. Although it was strongly intimated in *Colson* [*v. Smith*, 438 F.2d 1075] that where Negroes are excluded from the jury the defect is nonjurisdictional, the Supreme Court has recently ascribed such fundamental status to the right to be tried by a jury from which Negroes are not systematically excluded that we have some doubt as to the validity of the implications in *Colson*. Citing *Peters v. Kiff*, supra.

It would seem that the quoted language from *Patton* and *Peters v. Kiff* would indicate that indictments returned by improperly constituted grand juries, from which members of minority groups are systematically excluded, are void. Yet this Court has not yet so ruled specifically. Precedent and public policy would seem to require such a ruling.

## CONCLUSION

It is respectfully submitted that the facts of this case fall squarely within the purview of *Fay v. Noia, supra.*, and *Johnson v. Zerbst, supra.* In order to give Petitioner

the relief demanded, this Court will necessarily have to overrule *Fay* and *Zerbst*, on which countless decisions have been based. *Zerbst* alone has been cited in more than *three thousand* reported cases since it was announced. The Court will also have to redefine waiver and will have to reexamine and determine new standards for federal review of allegedly unconstitutional state action. A reversal here will effectively remove the jurisdiction of the federal judiciary in areas where state and local government will have the last word in interpreting its own alleged violation of the United States Constitution. Past experience indicates that, if such occurred, the Bill of Rights would soon be rendered meaningless in many jurisdictions.

The Petitioner insists that if Respondent prevails herein, "the floodgates would be open," and a horde of convicts would descend upon Davidson County, Tennessee, creating an intolerable burden on that County to retry or release these prisoners. It is somewhat ironic that the very authority, which deliberately violated Respondent's rights in imprisoning him for almost a quarter century, now begs the Court for relief because such a result would inconvenience that authority. The judgment below should be affirmed, and Respondent ordered released or retried within a reasonable time.

Respectfully submitted,

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

# SUPREME COURT OF THE UNITED STATES

Syllabus

## TOLLETT, WARDEN *v.* HENDERSON

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 72-95. Argued February 20, 1973—Decided April 17, 1973

Where a state criminal defendant, on advice of counsel, pleads guilty he cannot in a federal habeas corpus proceeding raise independent claims relating to the deprivation of constitutional rights that antedated the plea, *Brady* v. *United States*, 397 U. S. 742, such as infirmities in the grand jury selection process, but may only attack the voluntary and intelligent character of the guilty plea by showing that counsel's advice was not within the standards of *McMann* v. *Richardson*, 397 U. S. 759. Pp. 4–11.

459 F. 2d 237, reversed and remanded.

REHNQUIST, J., delivered the opinion of the Court, in which BURGER, C. J., and STEWART, WHITE, BLACKMUN, and POWELL, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which DOUGLAS and BRENNAN, JJ., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

# SUPREME COURT OF THE UNITED STATES

No. 72-95

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|---|---|
| Lewis S. Tollett, Warden, Petitioner, v. Willie Lee Henderson. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. |

[April 17, 1973]

MR. JUSTICE REHNQUIST delivered the opinion of the Court.

Twenty-five years ago respondent was indicted for the crime of first degree murder by a grand jury in Davidson County, Tennessee. On the advice of counsel, he pleaded guilty and was sentenced to a term of 99 years in prison. Many years later he sought habeas corpus in both state and federal courts. In one petition in United States District Court, he contended that a confession he had given to the police had been coerced, and that he had been denied the effective assistance of counsel. The District Court considered these claims and decided them adversely to respondent, the Court of Appeals for the Sixth Circuit affirmed without opinion, and this Court denied certiorari. *Henderson* v. *Henderson*, 391 U. S. 927 (1968). Respondent then sought state habeas corpus, alleging for the first time that he was deprived of his constitutional right because Negroes had been excluded from the grand jury which indicted him in 1948. After a series of proceedings in the Tennessee trial and appellate courts, the Tennessee Court of Criminal Appeals ultimately concluded that respondent had waived his claim by failure to raise it before pleading to the indictment, and by pleading guilty.

Respondent then filed in the United States District Court the petition for habeas corpus which commenced the present litigation, asserting the denial of his constitutional right by reason of the systematic exclusion of Negroes from grand jury service. Petitioner in effect conceded such systematic exclusion to have existed, and the District Court so found. The issue upon which the District Court and the Court of Appeals focused was whether respondent's failure to object to the indictment within the time provided by Tennessee law constituted a waiver of his Fourteenth Amendment right to be indicted by a constitutionally selected grand jury.

At a state hearing respondent testified that his lawyer did not inform him of his constitutional rights with respect to the composition of a grand jury, that he did not know how the grand jury was selected or that Negroes were systematically excluded, and that his attorney did not tell him that he could have challenged the indictment or that failure to challenge it would preclude him from later raising that issue. An unchallenged affidavit submitted by the attorney who represented respondent in the 1948 criminal proceeding stated that counsel did not know as a matter of fact that Negroes were systematically excluded from Davidson County grand jury, and that therefore there had been no occasion to advise respondent of any rights he had as to the composition or method of selection of that body.

On the basis of this evidence, the Court of Appeals held that the record demonstrated no such "waiver" of constitutional rights as that term was defined in *Johnson v. Zerbst*, 304 U. S. 458, 464 (1938)—"an intentional relinquishment or abandonment of a known right or privilege." The Court of Appeals went on to affirm the judgment of the District Court, which had ordered respondent released from custody because Negroes had been excluded from the grand jury which indicted him

for the offense in question. We granted certiorari in order to decide whether a state prisoner, pleading guilty with the advice of counsel, may later obtain release through federal habeas corpus by proving only that the indictment to which he pleaded was returned by an unconstitutionally selected grand jury.[1]

I

Respondent, a Negro, and two others were arrested by Tennessee authorities for the robbery of a Nashville liquor store and the attempted murder of an employee who was shot during the episode. Three weeks later the employee died, and a Davidson County grand jury subsequently returned a murder indictment against respondent. Respondent signed a confession admitting his involvement in the robbery and shooting.

At the time of his arrest, respondent was 20 years old and his formal education had terminated at the sixth grade level. He had no attorney when he signed the confession, but subsequently his mother retained counsel to represent him. The attorney's major effort appears to have been to arrange a form of plea bargain, whereby respondent would plead guilty to the murder charge and the sentence, although imposed by a petit jury, would be 99 years, rather than the ultimate penalty. Respondent initially expressed a desire to plead not guilty, but, apparently because of the evidence against him and the possibility that the death sentence might be imposed if he were convicted, he decided on the advice of his counsel

[1] In *Parker* v. *North Carolina*, 397 U. S. 790, 798 (1970), the Court said: "Whether the question of racial exclusion in the selection of the grand jury is open in a federal habeas corpus action we need not decide," citing three decisions of the courts of appeals. All of these decisions dealt with the issue of whether grand jury exclusion might be raised on federal habeas after a plea of not guilty and trial by jury. That issue is left open by this opinion, as it was by *Parker*.

to plead guilty. The plea was entered, and the agreed upon sentence was imposed.

II

For nearly a hundred years it has been established that the Constitution prohibits a State from systematically excluding Negroes from serving upon grand juries that indict for crime and petit juries that try the factual issue of the guilt or innocence of the accused. *Strauder* v. *West Virginia*, 10 Otto 303, 309 (1880). See also *Virginia* v. *Rives*, 10 Otto 313, 322–323 (1880). These holdings have been reaffirmed over the years, see, *e. g.*, *Norris* v. *Alabama*, 294 U. S. 587 (1935), and *Pierre* v. *Louisiana*, 306 U. S. 354 (1939), and are not of course questioned here. But respondent's assertion of this claim has another dimension to it; it was made for the first time many years after he had pleaded guilty to the offense for which he was indicted by the grand jury. None of our previous decisions dealing with the constitutional prohibition against racial discrimination in the selection of grand jurors has come to us in the context of a guilty plea.[1]

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[1] Cf. *Alexander* v. *Louisiana*, 405 U. S. 625 (1972); *Sims* v. *Georgia*, 389 U. S. 404 (1967); *Jones* v. *Georgia*, 389 U. S. 24 (1967); *Whitus* v. *Georgia*, 385 U. S. 545 (1967); *Coleman* v. *Alabama*, 377 U. S. 129 (1964); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Williams* v. *Georgia*, 349 U. S. 375 (1955); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Avery* v. *Georgia*, 345 U. S. 559 (1953); *Cassell* v. *Texas*, 339 U. S. 282 (1950); *Patton* v. *Mississippi*, 332 U. S. 463 (1947); *Akins* v. *Texas*, 325 U. S. 398 (1945); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1940); *Pierre* v. *Louisiana*, 306 U. S. 354 (1939); *Hale* v. *Kentucky*, 303 U. S. 613 (1938); *Hollins* v. *Oklahoma*, 295 U. S. 394 (1935); *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Martin* v. *Texas*, 200 U. S. 316 (1906); *Rogers* v. *Alabama*, 192 U. S. 226 (1904); *Tarrance* v. *Florida*, 188 U. S. 519 (1903); *Carter* v. *Texas*, 177 U. S. 442 (1900); *Williams* v. *Mississippi*, 170 U. S. 213 (1898); *Gibson* v. *Mississippi*, 162 U. S. 565 (1896); *Bush* v. *Kentucky*, 17

In *Brady* v. *United States*, 397 U. S. 742, 750, *McMann* v. *Richardson*, 397 U. S. 759, 770 (1970), and *Parker* v. *North Carolina*, 397 U. S. 790 (1970), this Court dealt at some length with the effect of a plea of guilty on the later assertion of claimed violations of constitutional rights. In *Brady* v. *United States*, *supra*, at 750, 758, the Court said:

> "The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family. All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas; the pleas are no more improperly compelled than is the decision by a defendant at the close of the State's evidence at trial that he must take the stand or face certain conviction.
>
> . . . . .
>
> "This mode of conviction is no more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial. We would have various doubts about this case if the encouragement of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our

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Otto 110 (1882); *Neal* v. *Delaware*, 13 Otto 370 (1880); *Strauder* v. *West Virginia*, 10 Otto 303 (1880).

view is to the contrary and is based on our expectations that courts will satisfy themselves that pleas of guilty are voluntary and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy and reliability of the defendants' admissions that they committed the crimes with which they are charged. In the case before us, nothing in the record impeaches Brady's plea or suggests that his admissions in open court were anything but the truth."

In *McMann* v. *Richardson*, *supra*, at 770–771, the Court laid down the general rule by which federal collateral attacks on convictions based on guilty pleas rendered with the advice of counsel were to be governed:

"In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." (Footnote omitted.)

The Court of Appeals in its opinion in this case expressed the view that *Brady*, *supra*, and *McMann*, *supra*, were not controlling, because, in its words:

"The *Brady* line of cases dealt only with challenges to the guilty plea itself; no such challenge has been made here. For this reason alone we believe that *Brady* and its successors cannot govern our decision

here." *Tollett* v. *Henderson*, 459 F. 2d 237, 242 n. 5 (CA6 1972).[4]

We think the Court of Appeals took too restrictive a view of our holdings in the *Brady* trilogy. In each of those cases the habeas petitioner alleged some deprivation of constitutional rights that preceded his decision to plead guilty. In *McMann, supra*, each of the respondents asserted that a coerced confession had been obtained by the State. In *Brady, supra*, the claim was that the burden placed on the exercise of the right to jury trial by the structure of the Federal Kidnapping Act, 18 U. S. C. § 1201—a burden which was held constitutionally impermissible in *United States* v. *Jackson*, 390 U. S. 570 (1968)—had motivated petitioner's decision to plead guilty. In *Parker, supra*, the claim was that a provision of that State's laws similar to that contained in 18 U. S. C. § 1201 had likewise motivated the guilty plea.

While the claims of coerced confessions extracted prior to the guilty plea in *McMann* were in a somewhat different posture than had they been made in attacking a jury verdict based in part upon such confessions, the claim of impermissible burden on the right to jury trial resulting from the structure of the Kidnapping Act and the North Carolina law, respectively, were not significantly different from what they would have been had they been made following a bench trial and judgment of conviction. But the Court in *Brady* and *Parker*, as well as in *McMann*, refused to address the merits of the claimed constitutional deprivations that occurred prior to the guilty plea. Instead, it concluded in each case

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[4] A recent decision of the Fourth Circuit, *Parker* v. *Ross*, — F. 2d — (CA4 1972), arrived at the conclusion we now reach by extending the reasoning of the *Brady* trilogy to the type of claim respondent seeks to assert.

that the issue was not the merits of these constitutional claims as such, but rather whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel.

There are no doubt factual and legal differences between respondent's present assertion of the claim of discriminatory selection of the members of a grand jury, and the assertion of the constitutional claims by the prisoners in the *Brady* trilogy. In the latter cases, the facts giving rise to the constitutional claims were generally known to the defendants and their attorneys prior to the entry of the guilty pleas, and the issue in this Court turned on the adequacy of the attorneys' advice in evaluating those facts as a part of the recommendation to plead guilty. In the instant case, the facts relating to the selection of the Davidson County grand jury in 1948 were found by the District Court and the Court of Appeals to have been unknown to both respondent and his attorney. If the issue were to be cast solely in terms of "waiver," the Court of Appeals was undoubtedly correct in concluding that there had been no such waiver here. But just as the guilty pleas in the *Brady* trilogy were found to foreclose direct inquiry into the merits of claimed antecedent constitutional violations there, we conclude that respondent's guilty plea here alike forecloses independent inquiry into the claim of discrimination in the selection of the grand jury.

III

We hold that after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of federal habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent constitutional infirmity. A state pris-

oner must, of course, prove that some constitutional infirmity occurred in the proceedings. But the inquiry does not end at that point, as the Court of Appeals apparently thought. If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, *supra*, at 771. Counsel's failure to evaluate properly facts giving rise to a constitutional claim, or his failure properly to inform himself of facts that would have shown the existence of a constitutional claim, might in particular fact situations meet this standard of proof. Thus while claims of prior constitutional deprivation may play a part in evaluating the advice rendered by counsel, they are not themselves independent grounds for federal collateral relief.

We thus reaffirm the principle recognized in the *Brady* trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*.

A guilty plea, voluntarily and intelligently entered, may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge, no matter how peripheral such a plea might be to the normal focus of counsel's inquiry. And just as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have cor-

rectly appraised the constitutional significance of certain historical facts, *McMann*, *supra*, it is likewise not sufficient that he show that if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings.

The principal value of counsel to the accused in a criminal prosecution often lies not in counsel's ability to recite a list of possible defenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of the law. Often the interests of the accused are not advanced by challenges that would only delay the inevitable date of prosecution, see *Brady* v. *United States*, *supra*, at 751–752, or by contesting all guilt, see *Santobello* v. *New York*, 404 U. S. 257 (1971). A prospect of plea bargaining, the expectation or hope of a lesser sentence, or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported.

In order to obtain his release on federal habeas under these circumstances, respondent must not only establish the unconstitutional discrimination in selection of grand jurors. He must also establish that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the "range of competence demanded of attorneys in criminal cases."

Because we do not have before us all of the papers dealing with respondent's previous federal habeas peti-

tions, we are not in a position to say whether he is presently precluded from raising the issue of the voluntary and intelligent nature of his guilty plea, or whether that claim would be open to him on appropriate allegations in a new or amended petition. The Court of Appeals was at pains to point out that respondent's present petition did not attack the guilty plea. In view of the reliance placed by the Court of Appeals and the District Court in their respective opinions in this case upon the statement of the concurring judge in the Tennessee Court of Criminal Appeals that "no lawyer in this state would have ever thought of objecting to the fact that Negroes did not serve on the grand jury in 1948," the chances of respondent being able to carry the necessary burden of proof in challenging the guilty plea would appear slim. Nonetheless, we prefer to have this issue, if it be open to respondent under federal habeas practice, first addressed by the District Court or by the Court of Appeals. Respondent was not at any rate entitled to release from custody solely by reason of the fact that the grand jury which indicted him was unconstitutionally selected, and the judgment of the Court of Appeals holding otherwise is

*Reversed and remanded for further proceeding consistent with this opinion.*

# SUPREME COURT OF THE UNITED STATES

No. 72-95

| | |
|---|---|
| Lewis S. Tollett, Warden, Petitioner, v. Willie Lee Henderson. | On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. |

[April 17, 1973]

MR. JUSTICE MARSHALL, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN join, dissenting.

I would affirm the judgment of the Court of Appeals. I am convinced that Henderson amply demonstrated that he is entitled to relief on any acceptable theory of voluntariness, right to effective assistance of counsel, or waiver, and that no further proceedings are necessary. The Court adopts an inflexible rule in a case where, as the Court of Appeals noted, the facts establish a need for flexibility. 459 F. 2d 237, 242 n. 5 (CA6 1962). In doing so, it disregards this Court's previous counsel that whether a defendant is to be precluded from establishing a claim that his constitutional rights have been infringed "must depend, in each case, upon the particular facts and circumstances surrounding that case," *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938).

The Court relies on the "guilty plea" trilogy, *Brady* v. *United States*, 397 U. S. 742 (1970), *McMann* v. *Richardson*, 397 U. S. 759 (1970), and *Parker* v. *North Carolina*, 397 U. S. 979 (1970). In each of those cases the Court held that a guilty plea, intelligently and voluntarily made, barred the assertion of later claims that at some point in the pretrial process, an admission of guilt had been unconstitutionally extracted, either through a coerced confession or through a plea of guilty induced by fear of enhanced punishment if such a plea were not made. In *McMann*, the Court summarized

the view of the criminal process underlying those cases, stating, "In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession." 397 U. S., at 770.

The Court today extends that holding, so that, even where counsel does not consider and present to his client the possibility of a challenge to the composition of the grand jury, the client is nonetheless held to have made an "intelligent" guilty plea. I think that this extension of the "guilty plea" trilogy is misconceived. Those cases were concerned with the practical consequences of overturning negotiated pleas of guilty simply on the ground that the defense may have misjudged the possibility of successfully raising constitutional challenges to the pretrial proceedings. The Court recognized the importance of plea bargaining to the administration of criminal justice. See, *e. g.*, *Brady* v. *United States*, *supra*, at 750–753. Promises of leniency, which the Court viewed as indistinguishable from the challenges in those cases, are used to induce defendants to forego possibly meritorious challenges to the proceedings against them. This, the Court believed, permitted the imposition of punishment on offenders who deserved it, without significantly impairing the integrity of the criminal process by leaving unsanctioned all constitutional violations.

Whatever one may think of this analysis,[1] it is plainly premised on the notion of bargain and exchange: in return for relinquishing a constitutional challenge, the offender receives more lenient treatment. Clearly, that decision must be made by the defendant, for we would

[1] MR. JUSTICE DOUGLAS, MR. JUSTICE BRENNAN, and I dissented in *McMann* and *Parker*, believing that guilty pleas were so prevalent that it did impair constitutional protections to permit a plea to bar challenges to the prosecution.

not let an attorney bargain away his client's rights.[2] It is the defendant who must, "with the help of competent counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." *Id.*, at 750. Yet nothing like that happened in this case. Henderson's attorney never presented to him the possibility that, by insisting upon indictment by a properly composed grand jury, he might secure a more favorable bargain. See Appendix, at 83, 96.

The opinion of the Court devotes most of its attention to assertions and reassertions that in all cases a guilty plea "may not be vacated because the defendant was not advised of every conceivable constitutional plea in abatement he might have to the charge." But the majority gives us almost no reason why those assertions should be accepted, and, with respect, I cannot accept them.

The Court invokes the specter of requiring counsel to present to his client "every conceivable constitutional plea in abatement," suggesting, I suppose, that there are such a huge number of conceivable constitutional objections to the prosecution as to make such a requirement utterly impractical. I doubt that this accurately reflects the true situation; in most cases only one or two possibly meritorious objections to the prosecution can be made before trial. And, after all, these are objections bottomed on constitutional guarantees. I would have thought that the fact that the Constitution placed

[2] Some of this Court's decisions suggest that an attorney's decision, in which the defendant does not participate, not to raise a constitutional objection may sometimes preclude successful reliance on the constitutional claim. See *Henry* v. *Mississippi*, 379 U. S. 445, 451 (1965); *Brookhart* v. *Janis*, 384 U. S. 1, 7–8 (1966). If such a rule is to be squarely adopted by this Court, it should be limited narrowly to situations in which practical realities bar consultation, as often may happen during the course of trial. Cf. *Murch* v. *Mottram*, 409 U. S. 41 (1972).

limits on the prosecution would be very important in deciding whether a lawyer's professional responsibility required him to consult with his client before taking action that led to a relinquishment of the constitutional objection. Surely *Brady* implied as much in saying that guilty pleas, because they operate as a waiver of constitutional rights, "must be knowing, intelligent acts done with *sufficient awareness of the relevant circumstances* and likely consequences," 397 U. S., at 748 (emphasis added). The Court today extends the holdings of the "guilty plea" trilogy without reference to the rationale by which these cases were reconciled with the requirements of the Constitution, that a plea is a waiver of constitutional rights only where the defendant has been informed of those rights and decides not to invoke them in order to gain some advantage.

In the end, the Court seems to adopt a concept of professional responsibility that I cannot accept. It would let an attorney "advance" the interests of his client without even informing himself about the facts underlying a constitutional challenge so that he might inform the client about the way in which, in the attorney's professional judgment, the course he is taking in fact advances those interests. "Faithful representation of the interest of his client" *ante*, p. 10, means, I believe, that an attorney must consult with the client fully on matters of constitutional magnitude. Without such consultation, the representation of criminal defendants becomes only another method of manipulating persons in situations where their control over their lives is precisely what is at stake.

If plea bargaining is to be constitutionally acceptable, it must rest upon personal choices made by defendants informed about possible alternatives; at least, they should know what options are open to them. In this

case, Henderson might have secured a sentence shorter than 99 years by requiring the State to defend the constitutionality of its procedures for selecting grand juries. As is clear from this record, such a defense could not have succeeded, and the embarrassment of attempting a defense might well have led the prosecution to offer a more favorable bargain.[3] I find nothing in the opinion of the Court that persuades me that Henderson's attorney acted "within the range of competence demanded of attorneys in criminal cases," *McMann* v. *Richardson*, *supra*, at 771, because he did not consult with his client on a matter about which consultation is required.

Petitioner suggests, however, that Henderson's attorney *may* have considered the possibility of challenging the indictment but rejected that course because he *believed* that the grand jury was in fact selected by procedures that conformed to constitutional requirements. There is only the barest support in the record for this contention,[4] and the District Judge explicitly found that no objection was made by counsel "quite simply, because the possibility never occurred to him." 342 F. Supp. 113, 115. But even if petitioner's suggestion were correct, it would not advance his cause. For then, as Judge Celebrezze aptly put it, the attorney's decision would have been "grossly inadequate in light of the

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[3] Even if the State successfully defended its procedures in a preliminary attack, or if it decided to institute proceedings anew by convening a new grand jury, Henderson would have secured time in which to prepare a better defense and in which passions over his offense might subside, so that a plea of not guilty might have been more attractive to him.

[4] In a hearing held in state court on Henderson's application for collateral relief, an affidavit from the attorney who had represented him was introduced. It stated in part, "I have never been aware of any irregularity in the method of selection of grand or petit juries, particularly in regard to systematic exclusion of members of any race . . . ." App., at 90.

clearly established constitutional law of the period." 459 F. 2d, at 242 n. 5.[4]

Henderson was indicted in March 1948 by a grand jury in Davidson County, Tennessee.[5] Although Negroes constituted 25% of the population of the county in 1948, not a single Negro had served on the grand jury in the years before 1948.[6] In addition, whenever the name of a Negro appeared on the lists from which members of the grand jury were chosen, the letters "c" or "col" were marked next to the name. In the words of the Court of Appeals, "officials were thus provided with a simple means of determining which citizens might be appropriately 'excused' from grand jury duty. It is apparent from the absence of any Negroes on the grand jury panels that the means were used and the impermissible end of exclusion accomplished." 459 F. 2d, at 239 n. 2.

Two points about these facts must be emphasized. First, the law was clear in 1948 that it was extremely difficult for a State to establish that it did not unconstitutionally exclude Negroes from service on the grand jury if no Negroes in fact served and a method of selection was used that brought to the attention of the persons selecting the grand jury the race of potential grand jurors. See, *e. g., Patton* v. *Mississippi*, 332 U. S. 463, 466 (1947); *Hill* v. *Texas*, 316 U. S. 400 (1942); *Smith* v. *Texas*, 311 U. S. 128 (1940). It was therefore relatively easy to assess whether, if an attorney could present that kind of evidence, a constitutional challenge to the indictment was likely to succeed. Thus, making the decision to

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[4] In this regard the strictures in *McMann* v. *Richardson*, 397 U. S. 759, 772-773 (1970), against assessing decisions by counsel in the light of subsequent developments in the law have no force.

[5] Davidson County includes the city of Nashville.

[6] The first Negro to serve on the Davidson County grand jury was selected in 1958.

challenge the grand jury is different from making the decision to challenge a confession as coerced or a search as unreasonable. The latter decision, as the Court emphasized in *McMann* v. *Richardson*, *supra*, at 769–770, often turns upon predictions about how certain facts will be viewed by a court attempting to apply largely unstructured tests of reasonableness or voluntariness under all the circumstances. I would therefore accord less weight to the fact that an attorney must make professional judgments in cases like this one than in cases like *McMann*, in line with the difference in the ease with which such judgments can confidently be made.

Second, it takes almost no inquiry at all to determine whether any Negroes had served on local grand juries and whether racial designations appeared on the lists from which grand jurors were chosen. In its quest to establish a general rule applicable to all cases of challenges to the composition of grand juries, the Court disregards this fact. Instead, it characterizes the problem as involving "amass[ing] a large quantum of factual data" and "elaborate consideration of whether pleas in abatement . . . might be factually supported." *Ante*, at pp. 9–10. Whatever might be the situation in other cases, the facts in this case show that no large amounts of data or elaborate consideration is involved. That is enough to demonstrate the fallacy of the Court's attempt to define a broad general rule. I would adhere to tests that turn on the facts of each case. Cf. *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

The Court suggests that the failure by Henderson's attorney to consider the possibility of a constitutional challenge may be excused because, in the words of a judge of the Tennessee Court of Criminal Appeals, 459 S. W. 2d 176, 179 (1970), "No lawyer in this State would have ever thought of objecting to the fact that Negroes did not serve on the Grand Jury in Tennessee in 1948."

That statement is simply untrue. Even cursory research has disclosed several cases at the appellate level in which such challenges were raised by local attorneys. *Kennedy* v. *State*, 186 Tenn. 310 (1948); *Williamson* v. *State*, 194 Tenn. 341 (1952); *Beckett* v. *United States*, 84 F. 2d 731 (CA6 1936). It may well be that Henderson received the same advice on this point [that is, none at all] that he would have received from most other lawyers in Tennessee in 1948." 459 F. 2d, at 242 n. 8. That should not exonerate Henderson's attorney, though; it reflects, as Judge Celebrezze said, "a too-long tolerated gap between the requirements of the Constitution and realities of Tennessee Criminal practice." *Ibid.* Determination of whether counsel is competent should not turn on the fact that many attorneys in a particular place at a given time would not think of raising certain claims. The test must be whether the advice was competent in light of the law of the time,* and without regard to local peculiarities. Cf. *Goldsby* v. *Harpole*, 263 F. 2d 71, 82 (CA5 1959); *Windom* v. *Cook*, 423 F. 2d 721 (CA5 1970).

If Henderson's attorney had had even a passing acquaintance with the Tennessee Supreme Court's decision in *Kennedy* v. *State*, *supra*, a decision plainly relevant to Henderson's situation and recently decided, he would have immediately noticed that he had a very strong case. The Tennessee Supreme Court held that Kennedy had

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*The offense in this case occurred in 1948; the report does not indicate when the trial commenced. In its opinion, the Tennessee Supreme Court noted that "some months ago this Court reversed a conviction . . . because no members of the colored race were summoned for jury service." 194 Tenn., at 346 (emphasis added).

*Including, of course, consideration of recent trends that might support frustral attempts to raise claims rejected in decisions whose rationale has been undermined by later decisions. Cf. *Tehan* v. *Shott*, 382 U. S. 406 (1966); *Milton* v. *Wainwright*, 407 U. S. 371, 381-382 (opinion of STEWART, J.).

failed to prove his claim of unconstitutional discrimination in the selection of grand jurors. The State Supreme Court in *Kennedy* emphasized that the jury commissioners in Maury County selected names from tax books that "contained no identifying symbols whereby the race of any taxpayer might be known," and that 10 persons of 109 summoned from jury service were Negroes. 186 Tenn., at 316. An attorney of minimal competence would have realized that, where no Negroes had been summoned for service over many years and where racial designation were used, the Tennessee Supreme Court would very probably have held the selection system unconstitutional, in line with the decision of this Court.[10]

I believe that the Court today adopts a rule that does not reflect the variety of circumstances in which claims like Henderson's arise. The Court's rule is particularly inappropriate in this very case. I therefore dissent.

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[10] Notwithstanding these differences between *Kennedy* and this case, petitioner suggests that it would have been "an exercise in futility" to have challenged the composition of the grand jury in this case. Brief for Petitioner, at 12. I would not lightly assume that a State's highest court would disregard clear holdings, consistently reiterated, of this Court. But even if petitioner's assessment is correct, it would further undercut extending the rationale of the "guilty plea" trilogy to this case. As I have said above, plea bargaining rests on an exchange. If the State refuses to acknowledge that it may have something to lose, by taking the position that state courts would fail to apply established constitutional standards to undisputed facts, no bargain is possible. In such a case, even on the rationale of the "guilty plea" cases, the plea would be involuntary.

Petitioner's suggestion is of course premised on an estimate of how a competent attorney would have assessed the chances of prevailing on the constitutional challenge. Since Henderson's attorney made no such assessment anyway, the suggestion has no relevance to this case.